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Nos. 22634, 22634-A

3496

v. 3496

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

ESTATE OF JOHN F. NUTT, Deceased,  
Eileen M. Nutt and Frances D. Nutt,  
Executrixes,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

---

EILEEN M. NUTT,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

---

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

ON PETITIONS FOR REVIEW OF THE DECISIONS OF  
THE TAX COURT OF THE UNITED STATES

---

OPINIONS BELOW

The findings of fact and opinions of the Tax Court of the United States, filed October 26, 1962 and August 18, 1967, are reported at 39 T.C. 231 and 48 T.C. No. 71, and are found in Volume 1 of the record herein at page 192, Volume 2 of the record herein at page 441.





## JURISDICTION

This appeal involves Federal income taxes. By separate notices of deficiency, both dated September 4, 1958, one being addressed to John F. Nutt and the other to Eileen M. Nutt, the Commissioner of Internal Revenue determined deficiencies as follows:

	<u>John F. Nutt</u>	<u>Eileen M. Nutt</u>
1955	\$20,795.45	\$20,699.45
1956	43,060.09	42,604.09
1957	38,806.03	38,806.04 (R.I-18, 31).

Separate petitions were filed with the Tax Court of the United States on November 24, 1958. (R.I-1, 25). Each petition sought a redetermination of the deficiencies set forth in the respective notices of deficiency. (R.I-1, 25). The decisions of Tax Court entered on April 18, 1963 determined deficiencies in income taxes as follows:

	<u>John F. Nutt</u>	<u>Eileen M. Nutt</u>
1955	\$10,045.34 (overpayment)	\$ 9,601.34 (overpayment)
1956	37,511.38	37,073.38
1957	46,747.12	46,747.12 (R.I-333, 334).

These cases were brought to this Court by separate petitions for review filed July 11, 1963. (R.I-335, 341, 237). On November 22, 1967, the cases were remanded to the Tax Court for proceedings in accordance with this Court's opinion filed October 1, 1965 and reported at 351 F. 2d 452 (9th Cir. 1965).

The Tax Court, after further proceedings pursuant to the remand,



entered its decisions on December 12, 1967 determining the

deficiencies to be as follows:

	<u>John F. Nutt</u>	<u>Eileen M. Nutt</u>
1955	\$10,045.34 (overpayment)	\$ 9,601.34 (overpayment)
1956	37,511.38	37,073.38
1957	46,747.12	46,747.12 (R. 2-552, 553).

The cases were again brought to this Court by separate petitions for review filed on the 8th day of January, 1968. (R.2-554, 562). The jurisdiction of this Court to review the aforesaid decisions of the Tax Court is founded on Sections 7482 and 7483 of the Internal Revenue Code of 1954.

#### STATEMENT OF THE CASE

This controversy involves the proper determination of the separate income tax liability of John F. Nutt, deceased, on the one hand, and Eileen M. Nutt, on the other hand, for the years 1955, 1956 and 1957.

During 1955, petitioners owned, as community property, approximately 2,400 acres of farm land near Eloy, Arizona. (R.I-195-196). The land was used to grow several types of crops among which was cotton. (R.I-196, 201). In addition to the 2,400 acres of fee land, petitioner John F. Nutt held leases on other farm land in the vicinity owned by four other persons. (R.I-197).

On August 30, 1955 petitioner John F. Nutt and petitioner



Eileen M. Nutt each sold his and her respective community interest in approximately 1,142 acres of the said 2,400 acres to Rancho Tierra Prieta, an Arizona corporation. (R.I-200). At the time of the sale, a growing cotton crop was affixed to the 1,142 acres. (R.I-200).

Neither the deed of conveyance nor the August 30, 1955 written agreement of sale between petitioners and Rancho contained any provision granting either of the petitioners separately or both petitioners jointly an option to reacquire the 1,142 acres so conveyed. (R.I-201). The gain realized on such sale by each petitioner was reported on the installment basis as capital gain on each's separate income tax returns for the years involved. (R.I-217).

When the respective community interests in the 1,142 acres and unharvested cotton crop were sold to Rancho on August 30, 1955, the outstanding stock of Rancho was owned as follows:

Stockholder	Class of Stock	No. of Shares
John F. Nutt	Common voting	75
Eileen M. Nutt	Common voting	75
Norman Nupen	Preferred nonvoting	1
Charles N. Walters	Preferred nonvoting	1 (R.I-199).

Thereafter, on August 20, 1956, John F. Nutt and petitioner Eileen M. Nutt each sold his and her respective community interest in 942.5 acres of land and the unharvested cotton crop thereon to Rancho. (R.I-234).

Neither the deed of conveyance nor the August 20, 1956





written agreement of sale between petitioners and Rancho contained any provision granting either of the petitioners separately or both petitioners jointly an option to reacquire the 942.5 acres so conveyed. (R.I-205). The gain realized on such sale by each petitioner was reported on the installment basis as capital gain on each's separate income tax returns for the years involved. (R.I-212).

Later the Commissioner of Internal Revenue, in separate statutory notices of deficiency issued to John F. Nutt and to Eileen M. Nutt for the taxable years 1955 through 1957, adopted the theory that all of the income realized by Rancho from the 1955 and 1956 cotton crops "is in reality the income of John F. Nutt and Eileen Nutt." (R.I-20, 44). That is, the Commissioner's sole ground was that the transaction was a sham and must be disregarded.

In addition to the sales by each petitioner of his and her community interest in the 1,145 acres and unharvested cotton crop during 1955 to Rancho, John F. Nutt also sold to an Arizona corporation named Black Land Farms, Inc., the aforesaid leases. At the time of the sale, a growing crop was affixed to said leased land. The gain realized upon the sale of such leaseholds was reported on the installment basis as capital gain in the separate income tax return filed by John F. Nutt and by Eileen M. Nutt for the years involved. (R.I-217). The capital gain was claimed by each return on the ground that the leaseholds constituted "capital assets". (Exh. 4-D at 6 and Exh.7-G at 4).



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Later in the same separate notices of deficiency referred to above, the Commissioner adopted the theory that all income realized by Black Land from the 1955 cotton crop grown on the said leased land "is in reality the income of John F. and Eileen Nutt." (R.I-20, 44).

Subsequently, separate petitions were filed by John F. Nutt and Eileen M. Nutt in the Tax Court on November 24, 1958. (R.I-1.25).

Thereafter, just a few days prior to a trial setting, after voluminous stipulations of fact had been prepared, the Commissioner filed a motion for leave to file an amended answer in each case, and filed an amended answer in each case. (R.I-56-57, 75-80). The said amended answers each departed from the ground set forth in the notices of deficiency and pleaded affirmatively the new theory that capital gain treatment should be disallowed on the sales of land and unharvested crop on the ground that John F. Nutt and also Eileen M. Nutt each retained a direct or indirect right to reacquire the land. (R.-76, 81). Additionally, the Commissioner pleaded affirmatively the new theory that the sale of leaseholds must be denied capital gain treatment because a leasehold is not considered as "land" to qualify for capital gain treatment permitted under Section 1231 (b) (4). (R.I-76, 81).

At the trial, the cases were consolidated for hearing.

The Tax Court held that while there was no case dealing with the Commissioner's regulation that Section 1231 (b) (4) does not apply to the "sale" of "an unharvested crop if the taxpayer retains any right or



option to reacquire the land the crop is on directly or indirectly", the indirect right existed "because petitioners were the sole holders of voting stock of Rancho." (Underscoring supplied) 39 T.C. 231, 252.

It analogized the instant case to the situations where there were dealings between "a sole stockholder and his corporation," and concluded that the existence of several specific and precise provisions dealing with transactions between a shareholder owning more than a stated percentage of corporate stock and a related corporation did not prevent a general rule requiring other special treatment of transactions between a "sole stockholder and his corporation." 39 T.C. 231, 253.

The Tax Court also held, even though petitioners had never claimed that a sale of leaseholds constituted a sale of land and unharvested crop under Section 1231(b)(4), that such leaseholds did not constitute land within the meaning of Section 1231(b)(4). 39 T.C. 231, 251.

Subsequently, John F. Nutt and also Eileen M. Nutt filed separate Petitions for Review. (R. I-231-237). Each argued: that the Tax Court's ruling that a leasehold was not land within the meaning of Section 1231 (b) (4) "so as to qualify for the capital gain treatment permitted" thereunder begged the whole issue of whether a leasehold was a capital asset under Section 1231 (b) (1)'s definition of "property used in the trade or business"; that concedely the leaseholds were not "land" within the meaning of Section 1231 (b) (4); and that since leaseholds held for more than six months were "property used in the trade or business" within the meaning of Section 1231 (b) (1), the gain therefrom is taxed as capital gain.



This Court's opinion of October 1, 1965, briefly held that its opinion in Bidart Bros. v U.S., 262 F. 2d 607, interpreting the word "land" as used in Section 1231 (b) (4) "completely precludes petitioners here." 351 F. 2d 452, 453.

In the same appeal to this Court, John F. Nutt and also Eileen M. Nutt also contended that the Commissioner's restricted interpretation of the term "sale" as found in Section 1231 was based on an unlawful regulation, and that even if a valid regulation, the Tax Court erred in concluding that each petitioner had retained an indirect right to reacquire the land from Rancho because together they owned all of the common stock of Rancho. Thus, each petitioner contended that each was entitled to capital gain treatment on their respective sales of their community interests in the land and unharvested crops.

This Court's opinion of October 1, 1965 remanded the case to the Tax Court for findings as to how the stock was owned and what were the incidents of such ownership. In so doing it noted that under Section 10-231 of the Arizona Revised Statutes "Eileen M. Nutt could have disposed of the stock registered in her name" and "John Nutt could have sold the stock registered in his name." 351 F. 2d 452, 454.

Subsequently, the Tax Court ruled that the 75 shares of stock in John F. Nutt's name and the 75 shares of stock in Eileen Nutt's name was community property, and that the stock registered in the name



of Eileen Nutt could be managed and controlled by John F. Nutt who could "vote the stock to dissolve the corporation and declare the land petitioners had sold to it as a dividend" or sell all of Eileen's stock to the corporation thereby leaving him as the registered owner of all the stock after which he could declare a dividend of the land or "sell the land to himself as community property."

Later the Tax Court denied petitioners' motion to reopen to receive a ruling of the Superior Court of Pinal County that the 75 shares of Rancho stock owned by John Nutt was the separate property of John Nutt. (R.II-475, 550-551).

These appeals followed.

#### SPECIFICATIONS OF ERRORS RELIED UPON

1. The Tax Court erred in finding that the stock owned by John F. Nutt, deceased, was community property.

2. The Tax Court erred in finding that the stock owned by Eileen M. Nutt was community property.

3. The Tax Court erred in holding that Commissioner of Internal Revenue overcame the presumption that the Rancho stock held by each taxpayer was the separate property of John F. Nutt and Eileen M. Nutt respectively.

4. The Tax Court erred in finding that the taxpayers had no agreement that the stock would be held by each as separate property.

5. The Tax Court erred in holding that the taxpayer John F.





Nutt, deceased, could, either directly or indirectly, reacquire the property conveyed to Rancho.

6. The Tax Court erred in holding that taxpayer Eileen M. Nutt could, either directly or indirectly, reacquire the land deeded to Rancho.

7. The Tax Court erred in holding that the community of John F. Nutt and Eileen M. Nutt was the taxable entity herein in complete disregard of the fact that it is the income tax liability of separate taxpayers, John F. Nutt and Eileen M. Nutt, which is involved.

8. The Tax Court erred in holding that John F. Nutt had the legal right to vote the stock held in the name of Eileen M. Nutt.

9. The Tax Court erred in holding that John F. Nutt had control of all the voting stock of Rancho and therefore had complete dominion over Rancho and could reacquire the land.

10. The Tax Court erred in interpreting the word sale in Section 1231 pursuant to U.S. Treas. Reg. 1.1341-1 (f).

11. The Tax Court erred in not reopening the case for further evidence on the question of how the stock of the corporation was owned.

#### ARGUMENT

The applicable rule of law, according to 10 Mertens, Law of Federal Income Taxation, § 58 A. 35, at page 98, is that:

"... when the Commissioner departs from the grounds relied on in his statutory deficiency notice to sustain a theory later raised, he had the burden of proving any new matter raised."



Cases so holding are Massingale v. United States, 59-1 U.S.T.C. Par. 9298 (D.C. Ariz. 1959) and Service Life Ins. Co. v. U.S., 189 F. Supp. 282 (D.C. Neb., 1960), aff'd 8 Cir., 1961, 293 F.2d 72.

Therefore, having departed from the ground relied on in each notice of deficiency - that Rancho's and Black Land's income from the cotton crops was in reality the income of John F. Nutt and of Eileen M. Nutt - the Commissioner of Internal Revenue had the burden of proving the new matter raised in its amended answers to the effect that each petitioner had retained an indirect right to reacquire the land purchased by Rancho, and that leaseholds are not property used in the trade or business as specially defined in Section 1231 (b) (1).

As shown below the Commissioner has not even attempted to carry his burden of proving that Eileen M. Nutt had an indirect right to reacquire the land sold to Rancho. Rather, by persuading the Tax Court to rule that John F. Nutt had management and control over the stock of Eileen M. Nutt, he proved that Eileen M. Nutt did not have an indirect right to reacquire the land. That is probably why the Tax Court made no finding that Eileen M. Nutt had an indirect right to reacquire the land but referred only to the claimed indirect right of John F. Nutt. This factor, along with the Tax Court's error in ruling that the said stock owned by each was community property, and the other errors hereinafter set forth, show that petitioners were entitled to capital gain treatment on the sale of each's community interest in land and cotton sold. Also, for the reasons hereinafter set forth, each was entitled to capital gain treatment on the sale



of property used in the trade or business (leaseholds).

I

The Shares Of Rancho's Stock Owned By Taxpayers John F. Nutt, Deceased, And Eileen M. Nutt, Respectively, Were The Separate Property Of Each.

The Commissioner has contended and the Tax Court has found that the corporate stock owned by each petitioner is community property. The contention and the finding are based upon the premise that petitioners did not overcome the presumption under Arizona law that all property acquired during coveture is community property. For the reasons that follow petitioners submit that they have not only overcome the Arizona presumption but here also created a presumption of separate ownership which has not been overcome by the Commissioner.

A

The Shares Of Stock Were Issued To Each Taxpayer In His Or Her Separate Capacity By The Taxpayers As Officers Of The Corporation.

While Arizona law provides that property acquired by either spouse during coveture is presumptively community property, such presumption is not conclusive. Thus, under Arizona law, when a conveyance of property to either spouse separately is surrounded by circumstances which demonstrate an intention that the property be owned separately, it is generally held that the property belongs separately to the spouse to whom it is conveyed. In Jones v. Rigdon, 32 Ariz. 291, 257 Pac. 639



(1927), the Court was concerned with a question which is very relevant to the determination of the issue now before this Court. Arizona law, of course, under the doctrine of Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) controls the determination in this Court. In Jones, supra, the Arizona Supreme Court in deciding whether a conveyance to the wife during coverture was community or separate property held that:

"The fact that a husband causes or permits a conveyance to be made to his wife tends to show that it was the intention of the parties that the property should be her separate estate... even where it appears the property was paid for with community funds. Contemporaneous conduct by the husband indicating his intention that his wife should have the property, coupled with the fact that the conveyance is to the wife is generally held conclusive that the property was intended to be her separate estate." (Underscoring supplied)

In this case, the stock was issued to each taxpayer individually, record title being in the separate names of John F. Nutt and Eileen M. Nutt, respectively. Separate shares of stock were issued to each of them reflecting individual ownership thereof and such separate ownership was recorded on the corporate stock registries. (Exs. 9, 43).

The above issuance and recordation was contemporaneous with the conveyance of the stock to each taxpayer as an individual. (Exs. 9, 43) Mr. and Mrs. Nutt, as officers and directors of the corporations, directly participated in the issuance and registry of the stock, the ownership of which is now in question. The taking of the stock in the separate names of each taxpayer, in addition to the contemporaneous conduct of the parties, including but not limited to direct participation in the issuance and registry of the stock, not only overcame the presumption





that such stock was community property but also established under Arizona law a presumption that the property belonged to the respective separate estate of each taxpayer. Jones v. Rigdon, supra; Martha Locke Shoenhair, 45 B.T.A. 576 (1941); Edwin M. Peterson, 35 T.C. 962 (1961).

While the funds with which the stock was originally purchased from the corporations were community property of the taxpayers, the community interest of each spouse in the funds was, under Arizona law, validly and effectively conveyed as separate interest in the stock, thus changing the character of the property from community to separate. Martha Locke Shoenhair, supra. (The Commissioner's Opening Brief on Remand p. 19). It is, in addition, a matter of record that John F. Nutt issued the stock certificates, signing them as President of Rancho. The entire conduct of the parties, when coupled with the issuance of the stock in the taxpayer's separate names, shows that it was the intention of the taxpayers that the stock should be the separate property of the husband and wife, respectively. In other words, the fact that one-half of the stock was issued and registered in the name of Eileen M. Nutt coupled with the fact that John F. Nutt directly caused the stock to be issued and registered in her name overcame the presumption of community property and established a conclusive presumption that the stock was intended to be her separate property even if it had been purchased with community funds. Conversely, the fact that Mrs. Nutt, as



Secretary of the corporations, caused the other one-half of the stock to be issued in the name of her husband gave rise to a conclusive presumption that she intended that stock to be his separate property even though it had been paid for with community funds. (Exs. 9, 43)

The Commissioner did not overcome the presumptions which arose that the corporate stock was the separate property of Eileen M. Nutt and John F. Nutt, respectively. The contentions that the said stock was community property is without merit and the Tax Court's finding to that effect is erroneous.

## II

The Taxpayer Eileen M. Nutt Is Entitled To Capital Gains Treatment On The Income Derived From Her Sale Of Land And The Crops Thereon To Rancho Because The Sale Is Within Section 1231 (b) (4) Of Internal Revenue Code Of 1954.

Taxpayer Eileen M. Nutt, in August of 1955 and again in August of 1956, sold to Rancho her community interest in land and an unharvested cotton crop. The gain derived from the sales was reported on the installment basis as capital gain. The government has sought to demonstrate that the taxpayers may indirectly reacquire the land and that the sale therefore comes within the provisions of U.S. Treasury Regulation § 1.1231 - (f) (1954) which provides that section 1231 (b) (4) does not apply to a sale where the seller retains the right to reacquire the land. The government has not sought to demonstrate that the taxpayer Eileen M. Nutt may, either directly or indirectly, by



her own acts, reacquire the land. Yet such a showing is necessary if the deficiency assessed against her is to stand on the ground that she has the right to reacquire the land.

Preliminarily it must be emphasized that here we are concerned with two separate taxpayers, not one. Therefore, the question with which we deal is whether each taxpayer can control Rancho in such a way as to reacquire the interest in land deeded to the corporation by that taxpayer.

A.

Assuming Arguendo That The Stock Held By Each  
Petitioner Was Community Property, Eileen M. Nutt Cannot Deal  
With The Community Interest Registered In Her Husband's Name And  
Therefore She Cannot Reacquire The Land.

Assuming arguendo that the 75 shares of Rancho stock held by Eileen M. Nutt and the 75 shares of Rancho stock held by John F. Nutt were each community property, the wife cannot, except with regard to certain statutory exceptions and allowances not here relevant, deal with her husband's interest in the community property in any manner whatsoever. Eileen M. Nutt's incapacity to dispose of community personal property is set forth by statute as follows:

"During coverture, personal property may be disposed of by the husband only." A.R.S., Sec. 25-211 B.

This being true Eileen M. Nutt has no capacity to reacquire the land



where the stock is deemed owned by the marital community of John F. Nutt and Eileen M. Nutt.

B.

Assuming That The Stock Is The Separate Property Of Each Petitioner, Eileen M. Nutt Cannot Deal With The Stock Which Belongs To John F. Nutt And Therefore Cannot Reacquire The Land From Rancho.

The truth of the above proposition is not subject to serious challenge. The Commissioner has never sought to show that Mrs. Nutt could in any way deal with the stock of John F. Nutt. Instead it has consistently tried to show that the stock held by each was community property.

If the stock was held by each taxpayer as his or her separate property, there is no dispute that Mrs. Nutt could deal with her property without consulting with or receiving permission from Mr. Nutt. Therefore, she could sell, vote, manage and control her shares in any manner deemed appropriate by her. However, given this legal ability, she would not be in a position to reacquire any interest in the land conveyed to Rancho since under the law of Arizona Mrs. Nutt could not dissolve the corporation unless she owned or controlled 66 2/3% of the voting shares. A.R.S., Sec. 10-361. It cannot be said that Mrs. Nutt retained the right to reacquire the interest in land conveyed to the





corporation merely because she, along with her husband, owned 100% of the corporation's voting stock. For example, suppose five sellers, none related to the other, each owned 20% of the land and crops sold and also 20% of the voting stock of the purchasing corporation. How could any one of these sellers have an indirect right to reacquire the land ? The "right" of each is dependent upon the actions of the others. If the proper number of other shareholders refused to vote their shares so as to allow the individual shareholders the right to reacquire the land, how could each obtain that interest in land? What sort of "right" exists if it is dependent upon the prior approval of others?

Here Eileen M. Nutt sold a one-half interest in lands and crops to Rancho, and received payment therefor. At the time of such sale, she was the separate owner of one-half of Rancho's voting stock, and the same was true with respect to her husband John F. Nutt. Therefore, how does Eileen M. Nutt, the owner of 50% of the voting stock, compel Rancho to return her one-half interest in the land? Obviously, the Commissioner and the Tax Court have attempted to resolve this burden by treating the two taxpayers, Eileen M. Nutt and John F. Nutt, as if they were one person. That is, they are attempting to apply some rule, not found in the Internal Revenue Code, that related parties, a husband and wife, are deemed to own and have control of stock owned by each other. It is also of interest to note that such a result would not even be attempted by the Commissioner in a non community property



state, and that therefore he is attempting to discriminate against those taxpayers who are citizens of community property states.

Therefore, whether Eileen M. Nutt held her 50% stock interest in Rancho as sole and separate property or as community property, she could not, by virtue of that ownership, reacquire her one-half interest in the land conveyed to Rancho. Therefore, pursuant to the provisions of Section 1231 Eileen M. Nutt is entitled to capital gain treatment on the gain derived from the sale to Rancho of her interest in the lands and crops regardless of whether John F. Nutt would or would not be entitled to capital gains treatment on the sale of his interest. That is, there is an important distinction to be drawn here. It is one thing to conclude that John F. Nutt had control over the stock in Eileen M. Nutt's name and that therefore he could reacquire the land, but it is an entirely different matter to conclude from such a finding that Eileen M. Nutt had an indirect right to reacquire the land. The two are mutually exclusive. If John F. Nutt had such right because he had dominion and control over the stock in Eileen M. Nutt's name, the other side of the coin is that Eileen M. Nutt could not have had such dominion and control over the stock held in John F. Nutt's name and/or her own name. The Tax Court cannot have it both ways, and the finding that John F. Nutt as manager of the community had control over the stock held in the name of Eileen M. Nutt excludes a finding that Eileen M. Nutt had the control



over her own and John F. Nutt's stock sufficient for her to reacquire her interest in the land and crops. How would she ever reacquire such interest, whether the stock was held as community property or as the sole and separate property of each, unless her husband agreed to vote the stock in such a manner as to permit the reacquisition of the land?

### III

The Estate Of John F. Nutt Is Entitled To Capital Gain Treatment On The Gain Derived By His Sale Of Land And Crop To Rancho Since The Sale Is Within The Meaning Of Section 1231 (b) (4).

Again, as in the case of Eileen M. Nutt, it should be pointed out that we are dealing with two separate taxpayers. The question then is whether John F. Nutt could control a number of shares in Rancho sufficient to dissolve the corporation and distribute its assets, namely the land, to its shareholders or to himself.

John F. Nutt also sold an interest in land to Rancho and reported the gain therefrom on the installment basis as capital gain. With respect to John F. Nutt the Commissioner and the Tax Court have sought to show that he could (assuming the stock was community property) , by the management and control of his wife's interest granted him under Arizona law, reacquire the land either for himself or for him and his wife. However, whether the stock held by each is deemed community property or the sole and separate property of each, John F. Nutt did not have the control over his wife's stock so that he could reacquire the land.



Assuming Arguendo, As The Commissioner Contends, That The Stock Is Community Property Of The Petitioners, Mr. Nutt Cannot Effectively Deal With The Stock Held In His Wife's Name.

The Commissioner contends that, under Arizona law, only John F. Nutt "could manage, control and dispose" of the corporate stock, one-half of which was registered in his wife's separate name. This contention is premised upon an assumption that the corporate stock was community property and upon an Arizona statute which provides: "During coverture, personal property may be disposed of by the husband only." A.R.S., Sec. 25-211 B. However, as Judge Chambers noted in his opinion remanding this case to the Tax Court, "Under Section 10-231 of the Arizona Revised Statutes Eileen M. Nutt could have disposed of the stock registered in her name." <sup>1</sup> Therefore, the Commissioner's contention that only John F. Nutt could dispose of the corporate stock is obviously incorrect.

The suggestion which the Commissioner has made that John F. Nutt could dispose of the stock registered in the separate name of Eileen M. Nutt and that she (Mrs. Nutt) would be estopped from challenging

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<sup>1</sup> By specific statutory provision Sec. 10-231 is deemed to have repealed Sec. 25-211 B in this respect. A.R.S., Sec. 1-245.





the validity of such a transfer is also incorrect. The stock certificates which were issued in the separate name of Eileen M. Nutt could be transferred only if she (Mrs. Nutt) first endorsed either the certificates or a written assignment or power of attorney to sell, assign, or transfer said share. A.R.S., Sec. 10-231. Therefore, John F. Nutt, qua husband, could not have disposed of the stock certificates in the separate name of Eileen M. Nutt (even if the said shares are held to be community property). To do so, he would first have had to obtain the consent of Mrs. Nutt to such a transfer evidenced by her endorsement of either the stock certificates or a written power of attorney or assignment.

Furthermore, it is also erroneous to suggest that as "head and master of the community" or "through the husband's absolute managerial power and control over the stock" John F. Nutt could have forced Mrs. Nutt to consent to a disposition by him of the said stock or to vote it as he directed. Such contention stems from a confusion of "might" with "right" based upon a misunderstanding of the basic principles of community property law and upon an erroneous idea of the wife's ownership and the husband's administrative control or power. In Goodell v. Koch, 282 U.S. 118 (1930) the Supreme Court, after a discussion of such basic principles of Arizona community property law, held that "... Power is not synonymous with right...." and rejected the government's argument made therein that because the husband, under Arizona community property law, had absolute management power and control over the community income, he had the right to do with it as he pleased and



should, therefore, be treated as the taxpayer to whom it was taxable in its entirety. In discussing the arguments that had been made by the government in Goodell v. Koch, supra, and companion cases, deFuniak, in Volume 1 of his treatise "Principles of Community Property", at pages 676-7 states:

"The chief error in these arguments as to the husband's 'control' and 'enjoyment' or 'benefit' of the income rests in the fact that the ones advancing these arguments are looking at this 'control' by the husband in the light of what such control is under the common law, where the control of the husband has unquestionably been one which he might exercise to his own use, enjoyment and benefit, to whatever extent he might choose. The use of common law standards as a means of interpreting the community property law is a common error...." (Underscoring supplied).

After explaining that the ownership of the wife in community property is equal in every respect to that of the husband and that the 'control' of the community property entrusted to his care is merely that of a statutory administrator, deFuniak goes on to say, at pages 677-680:

".... These are primary and basic principles of community property law. There is nothing corresponding to them in the common law where a 'control' vested in the husband is an absolute thing. It is the worst and most misleading thing one can do, to look at the word 'control' as it appears in connection with the community property law and then to interpret it and consider it in the light of common law experiences and to disregard the full force of the equal property concepts firmly embedded in the community property system. Yet it is the mistake most commonly committed by legal writer after legal writer, by lawyer after lawyer....

The Supreme Court of the United States has not, however, fallen into these errors and has clearly grasped the completeness and equality of the wife's ownership under the community property law and that the husband's duty of management or administration of the community property is equivalent merely to



that of a managing agent or partner for the benefit of the conjugal partnership. This it determined by unanimous opinion in the test cases brought before it from Washington, Arizona, Texas and Louisiana, particularly expressing its reasoning in the case of Poe v. Seaborn ... <sup>2</sup> (Underscoring supplied).

The foregoing principles have also been followed by the Tax Court in Arizona Publishing Co. 9 T.C. 85, 88 (1947) and Edwin M. Petersen, supra, wherein it was held that where possession and control over community property stems from a fiduciary relationship, the power of management thereof is not to be considered equivalent to complete dominion or control over the property by the managing spouse.

Therefore, the contention that because of his "absolute" power of management John F. Nutt could have forced Mrs. Nutt to consent to a disposition by him of the stock or that he could have directed her to vote it as he wished is without merit.

Section 25-211 B of the Arizona Revised Statutes provides:

"During coverture, personal property may be disposed of by the husband only." (Underscoring supplied).

Section 10-231 of the Arizona Revised Statutes, on the other hand, provides:

"A. Title to a certificate and to the shares represented thereby can be transferred only:

1. By delivery of the certificate endorsed either in blank or to a specified person by the person appearing by the certificate to be the owner of the shares represented thereby.

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<sup>2</sup> The case of Poe v. Seaborn cited in the quoted materials is found at 282 U.S. 101 (1930).



2. By delivery of the certificate and a separate document containing a written assignment of the certificate or a power of attorney to sell, assign or transfer the certificate or the shares represented thereby, signed by the person appearing by the certificate to be the owner of the shares represented thereby. Such assignment or power of attorney may be either in blank or to a specified person." (Underscoring supplied).

In other words, as Judge Chambers concluded: "Under Section 10-231 of the Arizona Revised Statutes Eileen Nutt could have disposed of the stock registered in her name." (Footnote 5 of the opinion of the Court of Appeals remanding this case.) Obviously a conflict exists, and is subject to the provisions of Section 1-245 of the Arizona Revised Statutes which provides:

"When a statute has been enacted and has become a law, no other statute or law is continued in force because it is consistent with the statute enacted, but in all cases provided for by the subsequent statute, the statutes, laws and rules theretofore in force, whether consistent or not with the provisions of the subsequent statute, unless expressly continued in force by it, shall be deemed repealed and abrogated."

In addition to the said statutory mandate, the Arizona Supreme Court has held that, as a matter of statutory construction, the Arizona rule is that where a subsequent act of the legislature is in conflict with a prior act, it by implication repeals so much of the prior act as is in conflict with the latter act. City of Bisbee v. Cochise County, 44 Ariz. 233, 36 P. 2d 559 (1934).

Petitioners submit that Section 10-231 of the Arizona Revised Statutes had repealed Section 25-211 B so that, for all practical purposes, it now provides: "During coverture, personal property may be disposed





of by the husband only, except for corporate stock issued in the separate name of the wife."

## B

Assuming, As Petitioners Contend, That The Stock Is The Separate Property Of Each Petitioner, Mr. Nutt Could In No Way Deal With Or Control The Stock Belonging To Mrs. Nutt.

The argument set forth in II B above is equally applicable to petitioner John F. Nutt. Under the provisions of Arizona law,

"B. Married women have the sole and exclusive control of their separate property. The separate property of a married woman is not liable for debts or obligations of the husband, and it may be sold, mortgaged, conveyed or bequeathed by the woman who owns it as if she were not married." A.R.S., Sec. 25-214 B. (Underscoring supplied).

Thus there is no legal way that this petitioner could control the voting of Mrs. Nutt's separate property so as to secure voting strength in himself sufficient to reacquire the land originally deeded to Rancho. A.R.S., Sec. 10-361, supra.

For the foregoing reasons, petitioners respectfully submit, it should be concluded, as a matter of law, that neither Eileen M. Nutt nor John F. Nutt had the right or option to reacquire the land sold to the corporation.

## IV

The Tax Court Erred In Refusing To Re-Open The Case Below So That "Proper Regard" Might Be Given To The Case Of Estate Of John



It has long been established by the Supreme Court of the United States that until a case has been fully adjudicated on direct appeal, consideration must be given to supervening decisions which are relevant and material to the merits of the controversy. Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538 (1940) and cases cited therein. Application of the said rule has resulted in remand of cases to the Circuit Court of Appeals for reconsideration in the light of a supervening decision,<sup>3</sup> as well as to the Tax Court where it appeared that the taxpayer may want to introduce further evidence in the light of the relevant supervening decision.<sup>4</sup>

The mandate in such cases directed a reconsideration and/or rehearing in the light of the supervening decision, and thus removed the question of whether or not the matter should be reconsidered and/or reheard from the province of the lower court's discretion. As a result the Circuit Courts of Appeals give consideration to an intervening decision

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See, eg., Blaauw v. Grand Trunk Western R. Co., 380 U.S. 127 (1965), which was remanded to the Seventh Circuit for reconsideration in the light of a supervening Illinois Appellate Court decision that was entered four months after entry of a decision by the Circuit Court and while petition for Certiorari was pending.

4

See, eg., Helvering v. Richter, 312 U.S. 561 (1941); Hormel v. Helvering, 312 U.S. 552 (1941).



brought to the Court's attention even though such decision was handed down while the appeal in the case before it was pending. See, eg., Dindo v. Grand Union Co., 331 F. 2d 138, 140 n. 1 (2d Cir. 1964).

Petitioners submit that, before reaching its decision in this case, the Tax Court was bound to give consideration to two judicial decisions which, although entered after the instant cases were submitted (but prior to the entry of the decision), are relevant and material to the disposition of one of the issues involved herein.

On June 5, 1967, the Supreme Court of the United States entered its decision in Commissioner v. Estate of Bosch, 387 U.S. 456 (1967).

Therein it confronted the problem of what effect must be given to a non-adversary<sup>5</sup> state trial court decree wherein a determination has been made respecting the character of a property interest on the resolution of a federal tax controversy turning upon the characterization, pursuant to state law, of said property interest. The court held that al-

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<sup>5</sup> The non-adversary nature of the state trial court proceedings involved in Bosch is substantiated as follows: In his brief the Commissioner (as petitioner) stated the "Question Presented" to be:  
"When the resolution of an issue in a federal estate tax controversy depends upon the character of a property interest owned or transferred by the decedent and the character of such interest has been determined in a non-adversary State trial court proceeding to which the United States was not a party, is the Federal court conclusively bound by that decision even though it is contrary to State law?" (Underscoring supplied).  
At pages 32-33 of his brief, the Commissioner then argued that "the State trial court proceedings were clearly non-adversary". The Supreme Court apparently agreed. It stated the position of the Government to be "that a state trial court adjudication is binding in such cases only when the judgment is the result of an adversary proceeding in the state court." (387 U.S. at 463). Obviously, if the state trial court proceedings involved in Bosch had been adversary in nature, the appeal therein would have been moot in the light of the issue framed by the Commissioner for review by the Supreme Court.



though the Tax Court (or any other federal court) is not conclusively bound by the state trial court's adjudication, it cannot ignore the decision and must give "proper regard" thereto in the course of its ascertainment of the applicable state law.

On July 31, 1967 the Superior Court of the State of Arizona in and for the County of Pinal entered an order declaring one-half of the corporate stock involved herein to be the separate property of John F. Nutt. Because the issue involved herein is determined in favor of petitioners if the property is separate, the relevancy and materiality of the said decision is apparent.

Thus, since the Supreme Court held in Bosch, supra, that the Tax Court must give "proper regard" to such a relevant ruling of a state trial court even though entered in a so called non-adversary proceeding, it follows that the Tax Court should have, in the course of ascertaining the applicable Arizona law, given consideration to the said ruling of the Arizona Superior Court. The Supreme Court has made it abundantly clear that the said Arizona decision cannot be ignored or brushed aside.

The necessity that the cases be reopened in the Tax Court for the taking of further evidence stems from the fact that the relevant ruling of the Arizona Superior Court is unreported and, therefore, certified copies thereof should have been admitted for the record.

In conclusion Bosch, supra, dictates that "proper regard" be





given in the Tax Court to state trial court decisions. Obviously "proper regard" cannot be given to matters not before the court. Therefore, the Tax Court erred in refusing to reopen the case for introduction of evidence material and relevant to the determination of applicable Arizona law on a question the answer for which this Court remanded the matter to the Tax Court: how was the stock of the taxpayers in Rancho owned by them?

V

The Limitation On The Word "Sold" Used In Section 1231 (b) (4), As Found In U.S. Treas. Reg. 1. 1231-1 (f), Is A Clear Violation Of The Doctrines Enunciated In Commissioner v. Brown, 380 U.S. 563 (1965).

By ruling that the word "sold" found in Section 1231 (b) (4) is restricted if each seller retains an indirect right to reacquire the land sold to Rancho, the Tax Court has violated the clear doctrines laid down in Commissioner v. Brown, 380 U.S. 563 (1965).

The case of Commissioner v. Brown, 380 U.S. 563 (1965), was, as the opinion stated at page 566, one of the many in the course of which the Commissioner of Internal Revenue questioned whether there had been a sale within the meaning of the Internal Revenue Code. In fact, when the Commissioner petitioned for a writ of certiorari, after this Court had held there was a sale, he told the Supreme Court therein that it was



one of the most important tax cases that had ever come to the Court, that "there now exists among the lower courts no core of agreement even as to the most generalized concept of what a sale meant," and that the Supreme Court should tell the lower courts what the word "sale" meant as used in the Internal Revenue Code. (Tr. 639-640). The Supreme Court took the case.

In the briefs filed by the parties, it was pointed out to the Supreme Court that the approach the Commissioner was attempting by giving the word "sale" a different meaning in federal tax law than its ordinary meaning, was affecting a multitude of transactions and had a host of adverse effects because the word "sale" appeared over 600 times in subchapter A alone.

The Supreme Court then responded to the Commissioner's petition that it tell the lower courts what the word "sale" meant as used in the Internal Revenue Code.

First, it noted, at page 570 of its opinion, the Commissioner's argument:

"Whatever substance the transaction might have had, however, the Commissioner claims that it did not have the substance of a sale within the meaning of § 1222 (3). His argument is that since the Institute invested nothing, assumed no independent liability for the purchase price and promised only to pay over a percentage of the earnings of the company, the entire risk of the transaction



remained on the sellers. Apparently, to qualify as a sale, a transfer of property for money or the promise of money must be to a financially responsible buyer who undertakes to pay the purchase price other than from the earnings or the assets themselves or there must be a substantial down payment which shifts at least part of the risk to the buyer and furnishes some cushion against loss to the seller." (Under-scoring supplied).

Next, the Supreme Court rejected the above argument, and gave its reasons:

" . . . This argument has rationality but it places an unwarranted construction on the term 'sale', is contrary to the policy of the capital gains provisions of the Internal Revenue Code, and has no support in the cases. We reject it."

Immediately thereafter, the Supreme Court told the lower courts what the word "sale" meant as used in the Internal Revenue Code. It held:

" 'Capital gain' and 'capital asset' are creatures of the tax law and the Court has been inclined to give these terms a narrow, rather than a broad construction. *Corn Products Co. v. Commissioner*, 350 U.S. 46, 52. A 'sale', however, is a common event in the non-tax world; and since it is used in the Code without limiting definition and without legislative history indicating a contrary result,



its common and ordinary meaning should at least be persuasive of its meaning as used in the Internal Revenue Code. 'Generally speaking, the language in the Revenue Act, just as in any statute, is to be given its ordinary meaning, and the words 'sale' and 'exchange' are not to be read any differently.' Helvering v. Flaccus Leather Co., 313 U.S. 247, 249; . . . Commissioner v. Korell, 339 U.S. 619, 627-628; Crane v. Commissioner, 331 U.S. 1, 6; Lang v. Commissioner, 289 U.S. 109, 111; Old Colony R. Co. v. Commissioner, 284 U.S. 552, 560.

" 'A sale, in the ordinary sense of the word, is a transfer of property for a fixed price in money or its equivalent, ' Iowa v. McFarland, 110 U.S. 471, 478; it is a contract to pass rights of property for money, -- which the buyer pays or promises to pay to the seller . . . , 'Williamson v. Berry, 8 How. 495, 544. Compare the definition of 'sale' in § 1 (2) of the Uniform Commercial Code. The transaction which occurred in this case was obviously a transfer of property for a fixed price payable in money." (Underscoring supplied).

Thus, the Supreme Court flatly rejected the government's argument that the term "sale" as used in the Internal Revenue Code is to receive some special interpretation reserved only for federal tax law, and ruled that the term "sale" is to be given its ordinary meaning -- a transfer of property for a fixed price in money or its equivalent.





Applying here the Supreme Court's definition of "sale" as a transfer of property for a fixed price in money or its equivalent, it follows that each of the petitioners sold his and her community interest in the land and crops to Rancho. Therefore, since the effect of U.S. Treas. Reg. 1.1231 - 1 (f) is to apply a restricted definition to the words "sale" and "sold", which violates Commissioner v. Brown, supra, the said regulation is unlawful. A sale is a sale whether or not the seller retains an indirect right to reacquire the property if there has been a transfer of property for a fixed price in money or its equivalent.

The error of the Tax Court's ruling upholding the validity of the said regulation is highlighted by its statement in its first opinion that its ruling was justified by the rule that the "definition of a capital asset must be narrowly applied." However, the Tax Court was not defining a capital asset but was ruling that the capital asset was not "sold" if the sellers retained an indirect right to reacquire the land. Thus, the application of such concept by the Tax Court was in error for that reason alone. Also, such application contradicts the holding in Commissioner v. Brown, supra, that the common and ordinary meaning of "sale" must be applied in federal tax law.

## VI

Leaseholds Held For More Than 6 Months Are Entitled To Capital Gain Treatment On Sale As Property Used In The Trade Or Business Within The Meaning Of Section 1231 (b) (1), And Therefore It Is Immaterial Whether Or Not Leaseholds Are Land Within The Meaning Of Section 1231



(b) (4), A Section Whose Benefits Petitioners Have Never Claimed.

As set forth in the Statement of the Case, petitioners never claimed the benefits of Section 1231 (b) (4) when seeking capital gain treatment on the sale of leaseholds. Rather they pointed out that they were entitled to capital gain treatment from the sale of property used in the trade or business of a character subject to the allowance for depreciation as defined in Section 1231 (b) (1) because leaseholds held for more than 6 months constituted such property. The arguments with respect thereto found in Point II of petitioners' opening brief filed in this Court on the first appeal are incorporated herewith.

All petitioners wish to add by way of emphasis is that the "issue" of whether a leasehold is "land" within the meaning of Section 1231 (b) (4) is a manufactured "issue raised by the Commissioner's amended answers, and the answer thereto is irrelevant to the question posed by petitioners, which is whether or not leaseholds held for six months or more constitute property used in the trade or business of a character subject to depreciation as specially defined in Section 1231 (b) (1). If the answer to the latter question is yes, then petitioners are entitled to capital gain treatment on the sale of the leaseholds.

CONCLUSION

Each petitioner submits that the decision of the Tax Court should



be reversed.

Respectfully submitted,

MC LANE & MC LANE

*William Lee McLane*

By William Lee McLane

*Nola McLane*

Nola McLane

*William A. Harrell*

William A. Harrell

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

*Nola McLane*

Nola McLane

Dated: May 31, 1968









## APPENDIX A

## EXHIBITS

NUMBER	IDENTIFIED	OFFERED	RECEIVED	REJECTED
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## Respondent's:

II	19*	20*	20*	
JJ	21*	21*	22*	
KK	29*	29*	29*	
LL and MM	40*	40*	40*	
NN through XX	47*	48*	49*	

## Petitioners':

Exhibit A to Motion to Reopen				551 (R. -II)
Exhibit B to Motion to Reopen				551 (R. -II)

\* Page references followed by \* are to Transcript of Hearing at Los Angeles, California on November 9, 1966 before the Tax Court.

Note: Exhibits received in evidence during the first hearing of these cases are to be found in Appendix A of Brief for Petitioners, Nos. 18950-1 (the first appeal herein) which is incorporated herein by reference.



STATUTE INVOLVED

Internal Revenue Code of 1954:

Section 1231 (b) Definition of Property Used in the Trade or Business. - For purposes of this section -

(1) General rule. - The term "property used in the trade or business" means property used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 167, held for more than 6 months, and real property used in the trade or business, held for more than 6 months, which is not -

\* \* \* \*

(4) Unharvested crop. - In the case of an unharvested crop on land used in the trade or business and held for more than 6 months, if the crop and the land are sold or exchanged (or compulsorily or involuntarily converted) at the same time and to the same person, the crop shall be considered as "property used in the trade or business".



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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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ESTATE OF JOHN F. NUTT, Deceased, EILEEN M. NUTT  
and FRANCES D. NUTT, Executrices,

Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

---

EILEEN M. NUTT,

Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

---

ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE  
TAX COURT OF THE UNITED STATES

---

BRIEF FOR THE RESPONDENT

---

MITCHELL ROGOVIN,  
Assistant Attorney General.

FILED

JUL 5 1968

WM. B. LUCK, CLERK

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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No. 22634

ESTATE OF JOHN F. NUTT, Deceased, EILEEN M. NUTT  
and FRANCES D. NUTT, Executrices,

Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

---

No. 22634-A

EILEEN M. NUTT,

Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

---

ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE  
TAX COURT OF THE UNITED STATES

---

BRIEF FOR THE RESPONDENT

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PRIOR OPINIONS

The original findings of fact and opinion of the Tax Court (I-R. 224-260) are reported at 39 T.C. 231. The prior opinion of this Court (II-R. 358-361) is reported at 351 F. 2d 452, and the denial of certiorari by the United States Supreme Court at 384 U.S. 918. The additional findings of fact and opinion of the Tax Court (II-R. 441-471) are reported at 48 T.C. 718.

JURISDICTION

These petitions for review (II-R. 554-559, 562-567) involve federal income taxes for the taxable years 1955, 1956 and 1957. On September 4, 1958, the Commissioner of Internal Revenue mailed to the taxpayers notices of deficiency, asserting deficiencies in their taxes in the aggregate amount of \$204,771.15. (I-R. 8-23, 31-47.) Within ninety days thereafter, on November 24, 1958, the taxpayers filed petitions with the Tax Court for redetermination of those deficiencies under the provisions of Section 6213 of the Internal Revenue Code of 1954. (I-R. 1-23, 25-47.) The decisions of the Tax Court were entered on April 18, 1963. (I-R. 333-334.) On July 11, 1963, petitions for review were filed (I-R. 335-345) within the three-month period prescribed in Section 7483 of the Internal Revenue Code of 1954. On October 1, 1965, this Court affirmed the Tax Court on one issue (II-R. 358-361) and remanded the case to the Tax Court for further proceedings with respect to the other issue. This Court denied the taxpayers' petition for rehearing on November 9, 1965 (351 F. 2d 452), with respect to the issue as to which this Court had affirmed the Tax Court, and on April 25, 1966, the United States Supreme Court denied the taxpayers' petition for certiorari (384 U.S. 918.)

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1/ For convenience, John F. Nutt will be referred to herein as one of the taxpayers, although he died on January 5, 1966, and his estate, with his wife and daughter as executrices, has been substituted as a party petitioner. (II-R. 412-415, 417.)

On remand, the Tax Court entered its decisions on December 12, 1967. (II-R. 552-553.) The cases are brought again to this Court by petitions for review filed January 8, 1968 (II-R. 554-567), filed within the three-month period prescribed in Section 7483 of the Internal Revenue Code of 1954. Jurisdiction is conferred on this Court by Section 7482 of that Code.

#### QUESTIONS PRESENTED

1. Whether the Tax Court erred in determining (a) that under Arizona law stock in two controlled corporations issued in the names of each taxpayer was community property during the taxable years 1955, 1956 and 1957 and at all times from the date of its issuance until the date of the death of the taxpayer-husband; and (b) that on account of his control of the corporation as manager of the community the husband-taxpayer had the right to reacquire the land which the taxpayers had sold, with growing crops, in 1955 and 1956 to the corporations, so that the taxpayers are not entitled to capital gain treatment on their profit from the sale, within the meaning of Section 1.1231-(f) of Treasury Regulations on Income Tax which provide that capital gains are not allowable on the sale of unharvested crops where the right to reacquire the land is retained.

2. Whether the Tax Court abused its discretion in denying taxpayers' motions to reopen and for further trial in order to receive new evidence consisting of an Arizona county court's order relating to the distribution of the taxpayer-husband's estate, entered in a non-adversary proceeding in which the United States was not a party, where the Tax Court found that the new evidence, if received, would not have been persuasive to change its opinion.

3. Whether the taxpayers may reopen an issue previously decided against them by this Court, and as to which the Supreme Court denied certiorari, namely, whether profit on the assignment of short-term leaseholds with growing crops to one of their controlled corporations is entitled to capital gain treatment within the meaning of 1954 Code, Section 1231, and Section 1.1231-(f) of the Treasury Regulations on Income Tax.

#### STATUTES AND REGULATIONS INVOLVED

The statutes and Regulations involved are set forth in the Appendix, infra.



STATEMENT

The pertinent findings of the Tax Court in the earlier case involving the same taxpayers (Nutt v. Commissioner, 39 T.C. 231, affirmed in part and remanded in part, 351 F. 2d 452) (C.A. 9th), certiorari denied, 384 U.S. 918) may be summarized as follows (I-R. 224-250; II-R. 358-361):

The taxpayers, husband and wife, residing in Eloy, Arizona, filed separate federal income tax returns for each of the taxable years 1955, 1956 and 1957 with the District Director of Internal Revenue at Phoenix, Arizona. These returns were filed on a community basis under the community property laws of Arizona. The husband listed his occupation as farmer on his returns, and the wife listed her occupation on her returns as housewife. (I-R. 226-227.)

At the beginning of the 1955 cotton crop year, taxpayers owned approximately 2,400 acres of farmland and held leases on various contiguous tracts. On August 25, 1955, the taxpayers incorporated Rancho Tierra Prieta (hereafter referred to as Rancho), under the laws of Arizona, for the general purpose of engaging in the business of farming. The total authorized capital stock of this corporation was 9,000 shares common voting stock and 1,000 shares of preferred non-voting stock, both classes with a stated par value of \$100 per share. The only issued and outstanding shares were 75 shares common

common voting issued to each taxpayer for which they paid \$7,500 each, and two shares of preferred non-voting, one share issued to N.C. Nuper the taxpayers' bookkeeper, and one to their attorney, Charles N. Walters, for which each apparently paid \$100. The officers of Rancho from the date of incorporation and throughout the taxable years were John F. Nutt, president, and Eileen M. Nutt, vice president and secretary-treasurer; the directors were the taxpayers and Mr. Nupen. (I-R. 228-229, 231; II-R. 359.)

On August 30, 1955, the taxpayers conveyed to Rancho 1,142 acres of land in Pinal County, Arizona, with unharvested cotton for \$324,933.13, of which \$92,660 represented the fair market value of the land, and \$232,273.13 the fair market value of the growing cotton crop. On August 20, 1956, the taxpayers conveyed to Rancho an additional 942.5 acres of land in Pinal County, Arizona, with growing crops, for an agreed consideration of \$273,553.75, of which \$72,210 represented the fair market value of the land, and \$201,343.75 represented the fair market value of the crops. Neither the deed nor the payment agreements between the taxpayers and Rancho contained provisions giving taxpayers an option to reacquire the land conveyed. Each payment agreement provided for payment to the taxpayers by Rancho of \$1,000 in cash, and the balance by notes secured by mortgages on the land and crops. Schedules of payments made by Rancho to the taxpayers in each of the three taxable years are set forth in the record. (I-R. 232-233, 234-236.)



On August 27, 1955, the taxpayers incorporated Black Land Farms, Inc. (hereafter referred to as Black Land), under the laws of Arizona, also to engage in the business of farming. The corporation had total authorized capital stock of 10,000 common shares with a stated par value of \$100 per share. The total issued and outstanding shares were 40 to the taxpayer-husband, 39 shares to the taxpayer-wife, and 21 to their adult daughter, Frances--all issued on August 29, 1955. The officers of Black Land from the date of incorporation and through the taxable years were John F. Nutt, president; Frances Nutt, vice president; and Eileen M. Nutt, secretary-treasurer. The taxpayers and Frances have been the directors. (I-R. 238-239.)

On August 30, 1955, the taxpayers assigned five short-term leaseholds on 1,286 acres of land, with unharvested crops thereon, to Black Land, for an agreed consideration of \$97,856.87, of which \$94,656.87 represented the fair market value of the unharvested crops and \$3,200 represented the fair market value of the unexpired leases. The taxpayers received a \$1,000 cash payment and a note for the balance due secured by a mortgage on the crops on the leaseholds, payment on this balance being made by Black Land to the taxpayers in 1955, 1956 and 1957, as shown in the record. (I-R. 240, 241.)

By a letter dated September 19, 1955, signed by the taxpayer husband as president, Rancho wrote the Agricultural Stabilization Committee, Pinal County, Casa Grande, Arizona, that it had acquired the land conveyed by the taxpayers to Rancho on August 30, 1955, and stated in part (I-R. 245):

I understand that this land is now a part of the farm on which your records show that John F. Nutt is the operator. It is my desire that they remain as they are presently set up and not be reconstituted.

A similar letter dated September 19, 1955, signed by the taxpayer husband as president, was sent to the Agricultural Stabilization Committee by Black Land concerning the leases assigned to Black Land by the taxpayers on August 30, 1955. (I-R. 245.)

In their separate federal income tax returns for the taxable years 1955, 1956 and 1957, the taxpayers reported the gain from the sale of land and unharvested crops to Rancho, and gain from the assignment of leaseholds of land on which unharvested crops were growing to Black Land, as capital gains. The taxpayers elected to use the installment basis in reporting the gain realized from these transactions. (I-R. 249.)

The Tax Court held (I-R. 225, 255-260) that the unharvested crops on the lands conveyed to Rancho and on the leaseholds assigned to Black Land were sold to such corporations, and, under 1954 Code Section 1231(b)(4) and Section 1.1231-1(f) of the Treasury Regulations on Income Tax (1954 Code), the gains on these sales were taxable as ordinary income, because under Section 1.1231-1(f) of the Treasury Regulations on Income Tax (1954 Code), the capital gains provisions are inapplicable where taxpayers retain any right to reacquire the land the crop is on, directly or indirectly, and a

leasehold is not "land" for the purpose of Section 1231. It held (1) that as to sales of land with unharvested crops to Rancho, the capital gains provisions of Code Section 1231 were inapplicable since the taxpayers retained the right to reacquire the land by virtue of their ownership of the voting stock of Rancho; and (2) as to assignment of leaseholds with unharvested crops to Black Land, no capital gains treatment may be had since the crops were sold with leaseholds, not land. This Court affirmed the holding on the second issue but remanded the case to the Tax Court for further proceedings with respect to the first issue. (351 F. 2d 452; II-R. 358-360.)

The additional facts, as found by the Tax Court on remand (II-R. 447-452), are as follows:

The taxpayers were married on September 5, 1920, in San Angelo, Texas. In 1926, when they moved to Arizona, neither of them owned any property or money other than personal effects and household goods. They lived together in Arizona until the taxpayer-husband's death on January 5, 1966, and the taxpayer-wife still resides there. (II-R. 447.)

At no time from 1920 throughout the taxable years 1955, 1956 and 1957, did either taxpayer receive any property by gift, devise, or descent, all property which they acquired during that period having been obtained from earnings of the taxpayer-husband as an electrical lineman, or from the taxpayers' joint efforts in farming. The taxpayers executed no agreement to divide any community property into separate properties of husband and wife. (II-R. 447.)

Under all of the deeds, except three, whereby taxpayers acquired the lands, portions of which they subsequently sold to Rancho in 1955 and 1956, the lands were conveyed to John F. Nutt and Eileen M. Nutt, husband and wife. (II-R. 447.)

The deed covering approximately 80 acres of property in the Southeast Quarter of the Northwest Quarter of Section 30, Township 8 South Range 8 East, Pinal County, Arizona, executed on the 26th day of December, 1935, conveyed the land to "John F. Nutt and Ileen [sic] Nutt his wife, as joint tenants with right of survivorship." (II-R. 447.)

Another deed, executed on January 8, 1945, conveyed all of Section 8 and the North half of Section 20, except the south 165 feet of the Northeast Quarter, Township 8, South of Range 8 East, Pinal County, Arizona, with certain exceptions for railroad and road right-of-ways, to "John F. Nutt and Eileen M. Nutt, not as tenants in common and not as a community property estate, but as joint tenants with right of survivorship." (II-R. 448.)

A deed executed on the 22nd day of December 1947 conveyed the Southwest Quarter of Section 29 and the Southeast Quarter and the East half of the Southwest Quarter of Section 30, Township 8 South, Range 8 East, in Pinal County, Arizona, to "John F. Nutt and Eileen M. Nutt, husband and wife not as tenants in common and not as a community property estate, but as joint tenants with right of survivorship." (II-R. 448.)

The major portions of Section 8 and of the North half of Section 20, and of Sections 29 and 30, acquired by the taxpayers

under these deeds, were sold by them to Rancho in 1955 and 1956. Some portions of those lands were not sold by the taxpayers during any of the years here in issue, but were retained by them. (II-R. 448.)

During the years 1953 through 1955, the taxpayers maintained three bank accounts, one designated as "farming account," one as "Rancho Tierra Prieta," and one as "commercial account." The farming account was used primarily to pay expenses on a lease known as the "Wagner lease," consisting of Section 24 and approximately 63 acres in the Northwest corner of Section 30 of Township 8 South, Pinal County, Arizona. The Rancho Tierra Prieta account was used in an operation carried on prior to the incorporation of the corporation Rancho Tierra Prieta and was closed out on August 29, 1955, and the funds were placed in the taxpayers' commercial account. Most of the funds in the farming account and the Rancho Tierra Prieta account were transfers from the commercial account. Deposits in the commercial account consisted primarily of receipts from the sale of farm produce, loans received with respect to operating the farm, and receipts from sale of property. No distinction as to what section or piece of land on which the crop was raised was made in the records maintained with respect to deposits of receipts from sales of farm produce in the commercial account. The commercial account was a joint account, and either taxpayer could draw checks against it and they did draw checks against this account for their personal as well as business expenses. The taxpayer-husband determined what funds were to be placed in the commercial account, but both taxpayers drew checks on that account. (II-R. 448-449.)



On August 26, 1955, a check to the order of Rancho Tierra Prieta in the amount of \$7,500 was drawn on the commercial account by John F. Nutt in payment for 75 shares of the common stock of that corporation issued to him by Certificate No. 1 of the corporation, and on August 26, 1955, a check payable to Rancho Tierra Prieta in the amount of \$7,500 was drawn on the commercial account, signed "Mrs. John F. Nutt," which check was issued in payment for 75 shares of stock of that corporation evidenced by Certificate No. 2, issued to Eileen M. Nutt. Both of these certificates were signed by John F. Nutt, president, and Eileen M. Nutt, secretary, which was in accordance with the by-laws of Rancho Tierra Prieta requiring such certificates to be signed by the president or vice president and the secretary. (II-R. 449-450.)

On August 29, 1955, a check in the amount of \$4,000 payable to the order of Black Land Farms, Inc., was drawn on the commercial account by John F. Nutt in payment for 40 shares of stock of that corporation evidenced by Certificate No. 1 issued to John F. Nutt, and on August 29, 1955, a check on the commercial account payable to the order of Black Land Farms, Inc., in the amount of \$3,900 was drawn by Eileen M. Nutt in payment for 39 shares of stock of that corporation evidenced by Certificate No. 2 issued to Eileen M. Nutt. These stock certificates were signed by John F. Nutt, president, and Eileen M. Nutt, secretary, which was in accordance with the provisions

of the by-laws of Black Land Farms, Inc., that stock certificates be signed by the president and the secretary. (II-R. 450.)

At a special meeting of the board of directors of Black Land Farms, Inc., held on August 21, 1967, a motion was unanimously carried that a dividend of \$10 per share be paid to all the shareholders of record of the common stock outstanding as of August 31, 1957. (II-R. 450.)

On the federal income tax return for the calendar year 1957 filed by John F. Nutt and on the federal income tax return for the calendar year 1957 filed by Eileen M. Nutt, dividends in the amount of \$1,895.54 were reported as community property, attributable 50 percent to the wife and 50 percent to the husband. (II-R. 450.) The dividends so reported were itemized as follows (II-R. 451):

United Funds Inc. - United Accumulated Fund	\$1,076.24
Massachusetts Investors Trust	129.30
Black Land Farms, Inc. (an Arizona corp.)	790.00
	<u>\$1,995.54</u>
	(100.00)
	<u>\$1,895.54</u>

This was in conformity with the reporting by the taxpayers during the taxable years 1955, 1956 and 1957 of all their income, including the capital gains reported on the sale of the lands, leaseholds and growing crops thereon, to Rancho Tierra Prieta and Black Land Farms, Inc., as community income, one-half of which was the income of each. (II-R. 451.)

On October 18, 1965, Eileen M. Nutt executed a will and testament in which, among other things, she stated, "I declare that all of the property which I now own is community property." Included

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This was in conformity with the reporting by the taxpayers during the taxable years 1955, 1956 and 1957 of all their income, including the capital gains reported on the sale of the lands, leaseholds and growing crops thereon, to Rancho Tierra Prieta and Black Land Farms, Inc., as community income, one-half of which was the income of each. (II-R. 451.)

On October 18, 1965, Eileen M. Nutt executed a will and testament in which, among other things, she stated, "I declare that all of the property which I now own is community property." Included

in the property which Eileen M. Nutt owned when this will was executed were the 75 shares of stock she owned in Rancho Tierra Prieta and the 39 shares of stock she owned in Black Land Farms, Inc. (II-R. 451.)

On March 4, 1966, Eileen M. Nutt filed in the Superior Court of the State of Arizona in the Matter of the Estate of John F. Nutt, Deceased, a document, which was sworn to in open court before a deputy clerk of the court, entitled, "Testimony of Applicant on Probate of Will," in which, among other things, she stated, "All of the estate of said deceased is community property, the same having been acquired since his marriage with Eileen M. Nutt." In this affidavit property of the deceased include 40 shares of stock in Black Land Farms, Inc., and 75 shares of stock in Rancho Tierra Prieta which had been issued in the name of John F. Nutt when the corporations were formed. (II-R. 451.) There has been no change in ownership of the issued shares of common stock in Black Land Farms, Inc., and Rancho Tierra Prieta on the books and records of those corporations since the original issuance. (II-R. 452.)

In December 1960, when Eileen M. Nutt received a dividend from Black Land Farms, Inc., she asked her husband if she could have it and he told her she could. She kept the amount of that dividend for her personal use and did not deposit it in the joint checking account of herself and her husband. (II-R. 452.)

The certificate of incorporation of Rancho Tierra Prieta provides that all issued shares of common stock shall have equal voting rights and the by-laws of that corporation provide that "Only persons in whose name shares entitled to vote stand in the stock records of the company on the day three days prior to the meeting of stockholders \* \* \* shall be entitled to vote at such meeting \* \* \*." (II-R. 452.)

The by-laws of Black Land Farms, Inc., provide that "each stockholder shall be entitled to one vote for each share of stock standing in his own name on the books of the company whether represented in person or by proxy." (II-R. 452.)

The Tax Court found as ultimate facts that the stock in Rancho Tierra Prieta and the stock in Black Land Farms, Inc. issued in the name of John F. Nutt, and the stock in these two corporations issued in the name of Eileen M. Nutt, were at all times from the date of its issue until the date of the death of John F. Nutt community property of John F. Nutt and Eileen M. Nutt. (II-R. 452.) It reiterated its previous determination that on account of the taxpayers' control of Rancho, they necessarily had the right to reacquire the land with growing crops thereon which they sold to Rancho. (II-R. 461-482.)

On August 15, 1967, the taxpayers filed a motion to reopen the case to receive allegedly new evidence. (II-R. 418-440.) Attached to the motion was a certified copy of a minute entry dated July 31, 1967, of the Superior Court of Pinal County, Arizona, entered in connection with the petition for final distribution of the estate of the taxpayer-husband, John F. Nutt, in which it was stated that the Court "FINDS that John F. Nutt was the sole owner of 75 shares common stock of Rancho Tierra Prieta, a corporation and sole owner of 40 shares of stock of Black Land Farms, Inc." (II-R. 421.) Also attached to the motion was a certified copy of a final decree of distribution (II-R. 422-440) in which John F. Nutt was also described (II-R. 440) as the sole owner of these shares.

After the opinion of the Tax Court had been entered, and after a hearing on the taxpayers' motion (II-R. 485-525), on September 15, 1967, the taxpayers filed a motion for further trial to present newly discovered evidence consisting of the same two exhibits they had attached to the previous motion. (II-R. 474-477.) Memoranda were filed (II-R. 527-549) and on November 17, 1967, the Tax Court entered its order denying the motions and stating that if the documents attached to the taxpayers' motion had been received in evidence, the additional evidence would not have been of sufficient weight to alter its conclusion (II-R. 550-551).

SUMMARY OF ARGUMENT

1. On the prior appeal this Court sustained the validity of Section 1.1231-1(f) of the Treasury Regulations which provides that capital gain benefits are not available under Section 1231(b)(4) of the Internal Revenue Code to the sale of unharvested crops with land where the taxpayers retain a right or option to reacquire the land the crops are on, directly or indirectly, except in a customary security transaction. This Court however remanded this case to the Tax Court to determine whether the taxpayers held the stock of their corporation as community property under the control of the husband.

On remand the Tax Court took further evidence and found that under Arizona law the stock was held by the taxpayers as community property subject to the management and control of the husband. These holdings are fully supported by the evidence and Arizona law. The presumption that all property acquired during marriage is community property was not overcome in this case. The taxpayers consistently treated the stock and the property by which it was acquired as community property in their operations, tax returns and pertinent documents. Section 10-231 of the Arizona Revised Statutes (Uniform Stock Transfer Act) deals with transfers of stock to bona fide third parties, and, between the taxpayers, does not affect the husband's control over the wife's community interest in the stock.

By reason of his control over the community stock, the husband taxpayer had the right to cause the corporation to reconvey the land to himself and wife at any time. Accordingly, the Tax Court correctly held that Section 1231(b)(4) of the Code did not apply and taxpayers are not entitled to capital gains on the sale to the corporation of the unharvested crops on the land sold.

2. The Tax Court did not abuse its discretion in denying taxpayers' motions to reopen and for further trial to receive allegedly new evidence consisting of a finding by a state probate court that the stock held in the husband's name was his separate property. The motions were tardily made nine months after the hearing below, four months after briefs were filed and only three days before the opinion of the Tax Court. In view of the opinions of the Supreme Court of Arizona and evidence on which the Tax Court relied in holding taxpayers' stock to be community property, the Tax Court properly concluded that if the finding of the lower state court had been received in evidence it would not have been of sufficient weight to alter the Tax Court's conclusion.

3. The taxpayers should be precluded from rearguing the claimed capital gain treatment of the profit they received on the sale of unharvested crops on leaseholds assigned to Black Land. On the prior appeal this Court affirmed the Tax Court's determination denying the capital gain treatment, and denied taxpayers' petition for rehearing. The Supreme Court denied taxpayers' petition for certiorari. This Court and the Tax Court properly followed this Court's decision in Bidart Bros. v. United States, 262 F. 2d 607, certiorari denied, 359 U.S. 1003, which is indistinguishable.



ARGUMENT

I

THE TAX COURT CORRECTLY HELD THE STOCK OF TAX-PAYERS WHOLLY OWNED CORPORATION TO BE COMMUNITY PROPERTY UNDER THE CONTROL OF THE HUSBAND WHO THEREBY HAD THE RIGHT TO REACQUIRE THE LAND FROM THE CORPORATION. ACCORDINGLY THE TAXPAYERS ARE NOT ENTITLED TO CAPITAL GAIN TREATMENT UNDER SECTION 1231(b)(4) OF THE INTERNAL REVENUE CODE OF 1954 ON THEIR PROFIT FROM THE SALE TO THE CORPORATION OF UNHARVESTED CROPS WITH THE LAND

- A. This Court has properly held that Congress did not intend capital gain benefits in instances where taxpayers retain a right to reacquire the land

The Tax Court has held (39 T.C. 231, I-R. 224-226; 48 T.C. 718, II-R. 441-471) that the capital gain treatment afforded by Section 1231(b)(4) of the 1954 Code, Appendix, infra, to certain sales of growing crops with the land is not applicable in 1955, 1956 and 1957 to the taxpayers' profit on the sale of unharvested crops and land to Rancho because the taxpayers retained a right or option to reacquire the land conveyed. The taxpayers argue (Br. 10-34), as they did in the earlier proceeding, that they are entitled to the claimed capital gain treatment. This Court remanded the case to the Tax Court for further proceedings on whether the stock of Rancho was held by the taxpayers as community property under Arizona law. (351 F. 2d 452, II-R. 358-361.)<sup>2/</sup> After hearing further evidence and receiving additional exhibits, the Tax Court determined on remand

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<sup>2/</sup> This Court there also asked for proceedings with respect to Black Land, which it stated had minor importance. (II-R. 301.)

that the shares of stock issued to the taxpayers were held as community property. (48 T.C. 718, II-R. 441-471.) It is submitted that the Tax Court was clearly correct in its determination.

Section 1231(b), in defining property used in a trade or business, provides in part as follows:

(4) Unharvested crop.--In the case of an unharvested crop on land used in the trade or business and held for more than 6 months, if the crop and the land are sold or exchanged (or compulsorily or involuntarily converted) at the same time and to the same person, the crop shall be considered as "property used in the trade or business."

The legislative history of this section indicates that Congress intended to afford capital gain treatment only to profits on sales by farmers who were going out of the business of growing crops on land they owned, since the transactions were not in the ordinary course of business. (See S. Rep. No. 781, 82d Cong., 1st Sess., pp. 47-48 (1951-2 Cum. Bull. 458, 491-492) on the Revenue Act of 1951, c. 521, 65 Stat. 452, Section 323 of which added Section 117(j)(3) of the Internal Revenue Code of 1939, which was substantially re-enacted as Section 1231(b)(4), and see also the Joint Committee Staff Summary of Provisions of the Revenue Act of 1951, pp. 32-33 (1951-2 Cum. Bull. 287, 311-312)).

Section 1.1231-1 of the Treasury Regulations on Income Tax (1954 Code), Appendix, infra, reflects this intention by providing in part:



(f) Unharvested crops. Section 1231 does not apply to a sale, exchange, or involuntary conversion of an unharvested crop if the taxpayer retains any right or option to reacquire the land the crop is on, directly or indirectly (other than a right customarily incident to a mortgage or other security transaction). The length of time for which the crop, as distinguished from the land, is held is immaterial. A leasehold or estate for years is not "land" for the purpose of Section 1231.

This Court has upheld the validity of this regulation. Nutt v. Commissioner, 351 F. 2d 452 (II-R. 358-361); Bidart Bros. v. United States, 262 F. 2d 607, certiorari denied, 359 U.S. 1003. Contrary to the taxpayers' contention (Br. 30-34), the regulation has not been shown to be unreasonable or plainly inconsistent with the statute. Cf. Commissioner v. South Texas Co., 333 U.S. 496, rehearing denied, 334 U.S. 813. It is in accord with the legislative history of Section 1231(b)(4) limiting special capital gain treatment to instances where a seller takes action other than in the ordinary course of his business, that is, to rid himself of his business, or some part of it, by selling in a single transaction some or all of his unharvested crops along with the land he owns on which the crops are growing.

B. Taxpayers had a right to reacquire land sold with unharvested crops

1. The taxpayers' stock in Rancho was community property

The taxpayers here retained a direct or indirect right or option to reacquire the land sold with unharvested crops growing thereon to Rancho, their controlled corporation, and the retention of this right makes them ineligible for capital gain treatment under the statute as implemented by the Treasury Regulations. The record

shows clearly that the Tax Court correctly determined that the taxpayer held the stock in Rancho as community property, so that the right to reacquire the property existed. As Mrs. Nutt testified (Tr. 1, 13-14),<sup>3</sup> when the taxpayers moved to Arizona in 1926 they had no money or property other than personal effects and household goods, and all property they subsequently acquired was obtained with earnings of Mr. Nutt as an electrical lineman or with amounts earned by them from farming.

Under Arizona law, the character of property, whether separate or community, is fixed at the time it is acquired, and remains unchanged unless altered by agreement of the parties or by operation of law. Kingsbery v. Kingsbery, 93 Ariz. 217, 379 P. 2d 893, 898. As the Tax Court pointed out (II-R. 454), the stock acquired by each taxpayer in both Rancho and Black Land was paid for with funds from the account in which was deposited receipts from the sale of farm products and loans with respect to the farming operation.

All property in Arizona, acquired by either spouse during marriage, other than property acquired by gift, devise, or descent, or earned by the wife and her minor children while she lives separate and apart from her husband, is community property. Arizona Revised Statutes Annotated (1956), Sec. 25-211.A, Appendix, infra. This has been interpreted to mean that all property acquired during coverture by the spouses is prima facie community property, as this

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<sup>3</sup>/ "Tr." references are to the transcript of testimony contained in Volume 3 of the record on appeal.

Court pointed out (II-R. 361), subject to limited specified exceptions, inapplicable here. Prater v. United States, 268 F. Supp. 754 (Ariz.); In re Torrey's Estate, 54 Ariz. 369, 95 P. 2d 990; In re Baldwin's Estate, 50 Ariz. 265, 71 P. 2d 791; Lovin v. Woodward, 45 Ariz. 105, 40 P. 2d 102; see also Mortensen v. Knight, 81 Ariz. 325, 305 P. 2d 463. The force and effect of this legal presumption was described in Porter v. Porter, 67 Ariz. 273, 195 P. 2d 132, as follows:

There is a legal presumption in this jurisdiction that all property acquired by either spouse during coverture takes on a community character. This presumption can be rebutted only by "strong", "satisfactory", "convincing", "clear and cogent", or "nearly conclusive evidence". In this respect it differs from most legal presumptions that are dispelled immediately upon the production of any evidence negating the presumption. The court must be satisfied that the property really is separate before it can state that the presumption has been dispelled. As long as there is any doubt, the property acquired during coverture must be presumed to be community property. \* \* \* [Citing Blaine v. Blaine, 63 Ariz. 100, 159 P. 2d 786, 790]. (Underlining supplied.)

See also Kennedy v. Kennedy, 93 Ariz. 252, 379 P. 2d 966. Thus, the fact that the taxpayers acquired this stock while they were married and living together in Arizona was sufficient to create a presumption that the stock was community property. The taxpayers offered no evidence to rebut this statutory presumption that all property acquired during their marriage was community property. There is no merit to the contention (Br. 13-14) that merely taking the stock of their corporations in their separate names established a presumption that it was separate property. The Arizona Supreme Court has held that even where title to real property is taken in the name of the husband and wife as joint tenants, that is not sufficient to rebut the presumption

that all property acquired during coverture is community property. In re Baldwin's Estate, supra. Section 25.211.A of the Arizona Statutes would be meaningless if taking property in the wife's name could rebut the statutory presumption. The case of Petersen v. Commissioner, 35 T.C. 962, relied on by taxpayers (Br. 14), involved the status of real property under California law. In Shoenhair v. Commissioner, 45 B.T.A. 576, also relied on by taxpayers (Br. 14), the case turned on the validity of an oral agreement between husband and wife that earnings of the husband in Arizona were to be his separate property. Neither case is in any way apposite here, as the Tax Court pointed out. (II-R. 455-457.) Jones v. Rigdon, 32 Ariz. 286, 257 Pac. 639, 640, relied on by taxpayers (Br. 12-13, 14), is factually distinguishable. In that case, a down payment on the real property in question was made by personal funds of the wife, a mortgage and note were signed only by her, and other facts, as well as the deed to the realty, showed that the husband intended to make a gift to his wife and intended for her to own the realty as her separate property. Here there was no indication of any intention by the parties that they intended the stock to be other than community property.

The taxpayers reported all income from the sale of their farm products as community income on their tax returns. (II-R. 451.) Mrs. Nutt testified that she and her husband had made no agreement that any of their property was other than community property. (Tr. 15-16.) This testimony is supported by her statements in a will and testament written in 1965 (when she still owned stock in both Rancho and Black Land) that all her property was community property. (II-R. 451; Tr. 22, Ex. JJ.) Her testimony is further supported by

her affidavit of March 4, 1966, filed in the Superior Court of Arizona in the proceedings with respect to the probate of her husband's will, in which she stated, "All of the estate of said deceased is community property, the same having been acquired since his marriage with Eileen M. Nutt." (II-R. 451, Tr. 20, Ex. II.) In this statement she included the stock in Rancho and Black Land which John F. Nutt had held from the time the corporations were formed in 1955 until his death in 1966. In 1957, dividends from Black Land were reported by the taxpayers as community property. (II-R. 450-451.)

Thus the record shows not only that the stock was bought with community funds, and that there was no agreement between the parties that any property they acquired was other than community property, but all the affirmative evidence is to the effect that the stock was community property. The testimony of Mrs. Nutt, together with statements in her will and in the affidavit referred to above, is consistent only with the fact that the stock in Rancho and Black Land was community property.

2. The taxpayer husband could manage and control Rancho stock in his wife's name held as community property

This Court in remanding the case to the Tax Court (351 F. 2d 452, II-R. 358-361) also requested the Tax Court to consider whether the stock registered in the name of Mrs. Nutt could have been managed and controlled by her husband during the taxable years. As the Tax Court pointed out, if Mr. Nutt could vote or dispose of his wife's stock, he would have an indirect right to reacquire the property the taxpayers sold to Rancho. The Tax Court concluded (II-R. 464-465) that Mr. Nutt, as manager of the personal property of the community, had the



legal right under Arizona law to vote the stock issued both in his name and in the name of his wife, and, since he had complete dominion over Rancho, he would have been able to reacquire the land sold by the taxpayers to Rancho.

In Arizona, the husband is the manager of all personalty held as community property, whether standing in his name or that of his wife, and he may contract debts to which all community property is subject. DePinto v. Provident Security Life Insurance Co., 323 F. 2d 826 (C.A. 9th), certiorari denied, 376 U.S. 950; Prater v. United States, 268 F. Supp. 754; City of Phoenix v. State of Arizona, 60 Ariz. 369, 137 P. 2d 783; Mortensen v. Knight, 81 Ariz. 325, 305 P. 2d 463; Shaw v. Greer, 67 Ariz. 223, 194 P. 2d 430. The only limitations on the husband's management of community property are that he may not encumber or sell real property without the consent of his wife, that he must exercise his management and control as a fiduciary for the best interests of the community, and that he must not exercise his management and control in fraud of the interest of the wife. Goodell v. Koch, 282 U.S. 118; Greer v. Goesling, 54 Ariz. 488, 97 P. 2d 218; LaTourette v. LaTourette, 15 Ariz. 200, 137 Pac. 426.

In Donato v. Fishburn, 90 Ariz. 210, 367 P. 2d 245, the court enforced a creditor's claim on the husband's note against community property assets although the wife had not signed the note, and it held that the husband could, as manager of the community property, contract an obligation enforceable against community property assets, regardless whether the marriage community received pecuniary benefit from his acti

It has been stated (Rappeport, The Husband and Management of Community Real Property, 1 Ariz. L. Rev. 13, 33 (1959)):

\* \* \* The Arizona statute [A.R.S. §25-211 (1955)] provides that as agent of the community, the husband has the general management and control of the community personalty, but does not provide who shall have the management and control of the community realty, apart from the disposition thereof. However, the Arizona court has stated in no uncertain terms that the husband is the "head and master of the community" and there is little doubt that the court was referring to the husband's power to manage both personalty and realty. [Citing City of Phoenix v. State ex rel Harless, 60 Ariz. 369, 137 P. 2d 783 (1943).] (Underlining supplied.)

The power of management includes the power to vote shares of stock and, therefore, to authorize actions by the management of the company. Although record owners of stock in Arizona, as in most states, have prima facie title, and ordinarily the right to vote the stock (Section 10-233, Arizona Revised Statutes Annotated (1956), Appendix, infra; Niesz v. Gorsuch, 295 F. 2d 909 (C.A. 9th)), and even, under some circumstances, the holder of shares endorsed in blank may vote the shares (Provident Security Life Insurance Co. v. Gorsuch, 323 F. 2d 839, 943-944 (C.A. 9th)), certiorari denied, 376 U.S. 950, the law is otherwise where there has been a bona fide transfer (Turnbull v. Longacre Bank, 249 N.Y. 159, 163 N.E. 135, 138; Winans v. Alpha Beta Food Market, 11 Cal. App. 2d 653, 54 P. 2d 48) or where the corporation has notice of conflicting claims (In re Alling's Estate, 186 Misc. 192, 63 N.Y.S. 2d 427, 431-432) (Surr. Ct.)). It must be presumed that the taxpayers here, as individual holders of the stock and also as officers and directors of their controlled corporations, in both capacities knew that the stock issued to them

was community property under Arizona law. Thus, Rancho did have notice of the conflicting claim with respect to the stock issued to Mrs. Nutt; i.e., that under the laws of community property of Arizona the husband had the right to manage and control such stock.

As manager of the personal property or the community, Mr. Nutt had the legal right during coverture, under Arizona law, to vote all the stock of Rancho, both that issued in his name and that issued in his wife's name. He could vote cumulatively for directors or trustees (Section 10-271, Arizona Revised Statutes Annotated (1956)), Appendix, infra) vote to **deposit the shares of Rancho with a** trustee of a voting trust (Section 10-301, Appendix, infra), or even vote to **dissolve** the corporation (Section 10-361, Arizona Revised Statutes Annotated (1956)).

Moreover, Section 25.211.B of the Arizona Revised Statutes Annotated (1956), Appendix, infra, provides that "During coverture, personal property may be disposed of by the husband only." See also LaTourette v. LaTourette, supra; Coe v. Winchester, 43 Ariz. 500, 33 P. 2d 286.

It seems clear that under Arizona law, as between husband and wife, only Mr. Nutt could manage, control, and dispose of the corporate stock held by the taxpayers in Rancho and Black Land, as the Tax Court found. Accordingly, Mr. Nutt had the power to vote the shares of stock so as to enable the corporation to declare



dividends of property, to redeem stock or to sell its realty to its shareholders. The property taxpayers transferred and the stock they received may be viewed as the corpus of a trust for the benefit of the marriage community. Mr. Nutt, as trustee, had unfettered authority during coverture to manage, control, substitute, and dispose of the corpus of the trust in furtherance of the marriage community. Section 25-211, Arizona Revised Statutes Annotated (1956); City of Phoenix v. State of Arizona, supra; Donato v. Fishburn, supra. Immediately after the transfer of the property to Rancho, Mr. Nutt could have directed the corporation, through his absolute voting control, to distribute the property to or for the benefit of the marriage community. Since Mr. Nutt had control of all voting stock of Rancho, and complete dominion over it, he thus retained the right to reacquire, directly or indirectly, on behalf of the marriage community, the land and growing crops transferred to Rancho within the meaning of Section 1.1231-1(f) of the Treasury Regulations. Mrs. Nutt retained the same right through the powers, rights, and duties she granted to her husband as the managing member of the marital community.

3. As between husband and wife, there is no conflict between the Uniform Stock Transfer Act of Arizona and the community property law of that state

The taxpayers contend (Br. 24-25) that Section 10-231, Arizona Revised Statutes Annotated, Appendix, infra, repealed by implication so much of Section 25-211.B as is in conflict with it. A similar argument

was made before the Tax Court on remand, and was rejected by the Tax Court. (II-R. 467-471.) We urge that the Tax Court properly held the argument to be without merit.

Section 10-231 substantially incorporates Section 1 of the Uniform Stock Transfer Act, and provides that title to a stock certificate and the corporate shares it represents can be transferred only by delivery of the certificate endorsed by the one whose name appears on the certificate as the owner, or by delivery of a written assignment signed by such owner. As we have stated above, Section 25-211.B provides that during coverture, personal property may be disposed of by the husband only.

The purpose of Section 1 of the Uniform Stock Transfer Act was to establish the stock certificate itself, and not the books of the corporation, as representative of the ownership of the intangible right of corporate shares. See 6 Uniform Laws Annotated (Uniform Stock Transfer Act), pp. 2, 18. The purpose of the Act was not primarily to determine ownership, but to make uniform in the states the method of transferring title. Fardy v. Mayerstein, 221 Ind. 339, 47 N.E. 2d 315; Untermeyer v. State Tax Commission, 102 Utah 214, 129 P. 2d 881, reversed on other grounds, 316 U.S. 645. The Uniform Stock Transfer Act is for the protection of a transferee who purchases the stock in good faith without notice of any fraud or irregularity in the endorsement. McCullen v. Hereford State Bank, 214 F. 2d 185 (C.A. 5th); Chatz v. Midco Oil Corp., 152 F. 2d 153 (C.A. 7th), certiorari denied, 329 U.S. 717; see also Hodson v. Hodson Corp., 32 Del. Ch. 76, 80 A. 2d 180.

In resolving any ostensible conflict between the Act and the Arizona community property law, it is clear that the Arizona courts would be reluctant to infer that any community property law has been abrogated. In re Baldwin's Estate, 50 Ariz. 265, 71 P. 2d 791. Any seeming inconsistency should be resolved in favor of the well-established principle that in Arizona the husband has the general management of the community, whether standing in his name or that of his wife (City of Phoenix v. State of Arizona, 60 Ariz. 369, 137 P. 2d (783), and that he is head of the family and its agent in controlling and managing the community property (Donato v. Fishburn, supra; Fee v. Arizona State Tax Com., 55 Ariz. 67, 98 P. 2d 467, 468), as the Tax Court correctly reasoned (II-R. 464).

Statutes should, of course, be given a reasonable interpretation which will render them valid and operative rather than one which would defeat them. Kelly v. Bastedo, 70 Ariz. 371, 220 P. 2d 1069; Hodson v. Hodson Corp., supra. Indeed, the possibility of any conflict in these sections of the Arizona statutes is eliminated under the facts of this case. Thus, under Section 25-211, the husband could manage, control, and dispose of all stock held by the marriage community pursuant to the public policy of Arizona to place all community personal property under the exclusive management of the husband. If Mrs. Nutt transferred stock registered in her name to a bona fide purchaser for value without her husband's consent, she could, under Section 10-231, transfer good title, and her husband could not rescind his wife's disposition because as manager of the community he caused the stock to be registered in his wife's name, and the

bona fide purchaser relied thereon. It should be noted, however, that in these circumstances Mrs. Nutt could not have satisfied the requirement of Section 10-241, Appendix, infra, that one who transfers a stock certificate for value warrants that he has a legal right to transfer it.

As between husband and wife, however, the taxpayer-wife could not deny that her husband had absolute power to manage, control, and dispose of the stock registered in her name. The Arizona Court of Appeals has held that Section 25-211, Arizona Revised Statutes Annotated (1956), is relevant in determining whether stock is separate or community property. Warren v. Warren, 2 Ariz. App. 206, 407 P. 2d 395. In that case, the husband had acquired stock in his name alone under a stock purchase plan of his employer, and in a divorce action the court awarded the wife the value of the husband's stock interest, observing that the stock plan was community property, regardless of the fact that the plan was in the husband's name alone. Again, in Spector v. Spector, 94 Ariz. 175, 382 P. 2d 659, 662, the Arizona court imposed a lien on stock, which had been community property but was awarded to the husband as his separate property in a divorce action, in order to secure payment to the wife of the value of her half of the community property awarded to the husband.

In real estate transactions the Arizona courts have held that a wife is equitably estopped from challenging the validity of the

transactions negotiated by the husband where she had not signed or entered into the transaction. Nickerson v. Arizona Consolidated Min. Co., 54 Ariz. 351, 95 P. 2d 983; Hall v. Weatherford, 32 Ariz. 370, 259 Pac. 282. A fortiori, it is submitted, the Arizona court would do the same with respect to stock to encourage the purposes of the community property law.

## II

THE TAX COURT DID NOT ABUSE ITS DISCRETION IN DENYING  
TAXPAYERS' MOTIONS TO REOPEN AND FOR FURTHER TRIAL TO  
RECEIVE ALLEGED NEWLY DISCOVERED EVIDENCE

On August 15, 1967, three days before the opinion of the Tax Court was filed, but over nine months after the hearing of the case on remand, and approximately four months after briefs were filed, the taxpayers filed a motion to reopen the case to receive allegedly new evidence. (II-R. 418-440.) Attached to the motion was a certified copy of a minute entry dated July 31, 1967, of the Superior Court of Pinal County, Arizona, entered in connection with the petition for final distribution of the estate of the taxpayer-husband, John F. Nutt, in which it was stated that the Court "FINDS that John F. Nutt was the sole owner of 75 shares common stock of Rancho Tierra Prieta, a corporation and sole owner of 40 shares of stock of Black Land Farms, Inc." (II-R. 421.) Also attached to the motion was a certified copy of a final decree of distribution (II-R. 422-440) in which John F. Nutt was also described as the sole owner of these shares (II-R. 440). After a hearing on the motion (II-R. 485-525), on September 15, 1967, the taxpayers filed a motion for further trial to present newly discovered evidence



consisting of the same two exhibits they had attached to the previous motion (II-R. 474-477). Memoranda were filed (II-R. 527-549), and on November 17, 1967, the Tax Court entered its order denying the motions, and stating that if the documents attached to the taxpayers' motions had been received in evidence, the additional evidence would not have been of sufficient weight to alter its conclusion (II-R. 550-551).

The taxpayers now urge (Br. 26-30) that the Tax Court erred in refusing to reopen the case, arguing that the Tax Court failed to follow the admonition of Commissioner v. Estate of Bosch, 387 U.S. 456, 465, that where there is no decision by the highest court of a state, "then federal authorities must apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the State." The Commissioner contends that there is no merit to the taxpayers' contention, and that the Tax Court in no way abused its judicial discretion in denying the motions.

The granting or refusing of a motion to reopen the record to receive newly discovered evidence is clearly within the sound discretion of the Tax Court. Bankers Coal Co. v. Burnet, 287 U.S. 308; Henry Van Hummell, Inc. v. Commissioner, 364 F. 2d 746 (C.A. 10th) certiorari denied, 386 U.S. 956; Chiquita Mining Co. v. Commissioner, 148 F. 2d 306 (C.A. 9th). In the absence of any abuse of discretion, such denial should not be reversed. Pfister v. Finance Corp., 317 U.S. 144, rehearing denied, 317 U.S. 714, affirming 123 F. 2d 543 (C.A. 7th); Conboy v. First Nat. Bk. of Jersey City, 203 U.S. 141, 149 150. Moreover, a motion for new trial on the ground of newly discovered

evidence must show that it is of such character that on new trial such evidence will probably produce a different result. Marshall's U.S. Auto Supply v. Cashman, 111 F. 2d 140, 142 (C.A. 10th), certiorari denied, 311 U.S. 667. The Tax Court found the proffered evidence unpersuasive. (II-R. 551.)

The documents relied on by the taxpayers here do not purport to clarify any rule of law of Arizona, for they describe neither the evidence on which the Pinal County Court made its finding nor the reasoning of the Court. There is no showing that any evidence at all was offered to the County Court Judge, and certainly none that was not offered in the Tax Court below. There is no showing that the Pinal County Judge was advised that there was any dispute about the manner in which Mr. Nutt held the stock.<sup>4/</sup>

The Tax Court, as we have shown in the first point of this brief, carefully analyzed the opinions of the Supreme Court of Arizona in reaching its conclusion that Mr. Nutt held the stock of Rancho and Black Land as community property. It has given "proper regard" to those decisions within the meaning of the Bosch case, supra. It is submitted that the Tax Court had no duty to receive

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<sup>4/</sup> The Commissioner's brief in opposition to the motion to reopen (II-R. 548) informed the Tax Court that proof could be offered that counsel for the co-executrices had advised the Judge of the Superior Court of Pinal County, who entered the order relied on, that the finding was necessary for income tax purposes, and that there was no issue as to how the stock was held.

unpersuasive evidence not in existence at the time of the trial, where there was no showing that the newly discovered evidence would produce a different result. No abuse of discretion has been shown.

### III

THE TAXPAYERS SHOULD BE PRECLUDED FROM REARGUING THE CLAIMED CAPITAL GAIN TREATMENT OF THE PROFIT FROM THE SALE OF UNHARVESTED CROPS ON LEASEHOLDS TRANSFERRED TO BLACK LAND

The Tax Court on remand interpreted (II-R. 446) the opinion of this Court (351 F. 2d 452, 453, II-R. 358, 359, rehearing denied November 9, 1965, certiorari denied 384 U.S. 918) correctly to be an affirmance of the Tax Court's prior holding (I-R. 224-225, 256) that the gain on the sale of unharvested crops growing on the leaseholds assigned to Black Land was taxable as ordinary income. See Bidart Bros. v. United States, 262 F. 2d 607, certiorari denied, 359 U.S. 1003. The taxpayers have attempted to reargue this issue, contending (Br. 34-35), as they did before, that the leaseholds constituted "property used in the trade or business" as defined in 1954 Code Section 1231(b)(1) because leaseholds are subject to the depreciation allowance for which provision is made in Code Section 167. We are not here concerned, however, with the classification of a leasehold; the case involved only the portion of the sales price (\$97,856.87) attributable to the unharvested crops (\$94,656.87). (I-R. 240.)



As this Court pointed out in its Bidart opinion, the rule regarding a sale of land together with a mature but unharvested crop is that the sale price attributable to the unharvested crop is taxable as ordinary income rather than capital gain (Watson v. Commissioner, 345 U.S. 544); and that rule has been changed only to the extent that Congress has by statute provided that in the case of an unharvested crop on land used in the trade or business and held for more than six months, the crop is to be considered as "property used in the trade or business" (and thus accorded capital gain treatment) if the crop and the land are sold or exchanged at the same time and to the same person. 1954 Code Section 1231(b)(4). Of controlling importance here is the fact that the statute applies only to a sale of "land", while the sale here was of a leasehold. As this Court held in Bidart, a leasehold is not "land" for the purposes of this statute. See also Section 1.1231-1(f) of the Treasury Regulations on Income Tax (1954 Code). This holding is consistent with the holding of the Supreme Court in Corn Products Co. v. Commissioner, 350 U.S. 46, that capital gains treatment must be narrowly confined.

The prior decision of this Court on this issue, as to which the Supreme Court denied certiorari, was correct and should be reaffirmed.



CONCLUSION

The decisions of the Tax Court were correct and should be affirmed.

Respectfully submitted,

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JULY, 1968.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: \_\_\_\_\_ day of \_\_\_\_\_ 1968.

\_\_\_\_\_  
Elmer J. Kelsey



APPENDIX

Internal Revenue Code of 1954:

SEC. 1231. PROPERTY USED IN THE TRADE OR BUSINESS AND  
INVOLUNTARY CONVERSIONS.

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(b) Definition of Property Used in the Trade or Business.--  
For purposes of this section--

(1) General rule.--The term "property used in the trade or business" means property used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 167, held for more than 6 months, and real property used in the trade or business, held for more than 6 months, which is not--

(A) property of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year,

(B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or

(C) a copyright, a literary, musical, or artistic composition, or similar property, held by a taxpayer described in paragraph (d) of section 1221.

(2) Timber or coal.--Such term includes timber and coal with respect to which section 631 applies.

(3) Livestock.--Such term also includes livestock, regardless of age, held by the taxpayer for draft, breeding, or dairy purposes, and held by him for 12 months or more from the date of acquisition. Such term does not include poultry.

(4) Unharvested crop.--In the case of an unharvested crop on land used in the trade or business and held for more than 6 months, if the crop and the land are sold or exchanged (or compulsorily or involuntarily converted) at the same time and to the same person, the crop shall be considered as "property used in the trade or business."

SEC. 1239. GAIN FROM SALE OF CERTAIN PROPERTY BETWEEN SPOUSES OR BETWEEN AN INDIVIDUAL AND A CONTROLLED CORPORATION.

(a) Treatment of Gain as Ordinary Income.--In the case of a sale or exchange, directly or indirectly, of property described in subsection (b)--

\* \* \*

(2) between an individual and a corporation more than 80 percent in value of the outstanding stock of which is owned by such individual, his spouse, and his minor children and minor grandchildren;

any gain recognized to the transferor from the sale or exchange of such property shall be considered as gain from the sale or exchange of property which is neither a capital asset nor property described in section 1231.

(b) Section Applicable Only to Sales or Exchanges of Depreciable Property.--This section shall apply only in the case of a sale or exchange by a transferor of property which in the hands of the transferee is property of a character which is subject to the allowance for depreciation provided in section 167.

(26 U.S.C. 1964 ed., Sec. 1239.)

Treasury Regulations on Income Tax (1954 Code):

Sec. 1.1231-1 Gains and losses from the sale or exchange of certain property used in the trade or business.

\* \* \*

(f) Unharvested crops. Section 1231 does not apply to a sale, exchange, or involuntary conversion of an unharvested crop if the taxpayer retains any right or option to reacquire the land the crop is on, directly or indirectly (other than a right customarily incident to a mortgage or other security transaction). The length of time for which the crop, as distinguished from the land, is held is immaterial. A leasehold or estate for years is not "land" for the purpose of section 1231.

\* \* \*

(26 C.F.R., Sec. 1.1231-1.)

3 Arizona Revised Statutes **Annotated** (1956):

§ 10-152. General corporate powers

In addition to the powers granted to corporations by law, they may:

1. Have perpetual succession.
2. Sue and be sued by the corporate name.
3. Have a common seal and alter the same at pleasure.
4. Provide that the shares or interest of shareholders be transferable and prescribe the manner of making the transfer.
5. Exempt private property of shareholders from liability for corporate debts.
6. Make contracts, acquire and transfer property, possessing the same powers in such respects as private individuals enjoy.
7. Establish by-laws and make rules and regulations deemed expedient for the management of their affairs not inconsistent with law.

§ 10-231. Transfer of certificates and shares

A. Title to a certificate and to the shares represented thereby can be transferred only:

1. By delivery of the certificate endorsed either in blank or to a specified person by the person appearing by the certificate to be the owner of the shares represented thereby.
2. By delivery of the certificate and a separate document containing a written assignment of the certificate or a power of attorney to sell, assign or transfer the certificate or the shares represented thereby, signed by the person appearing by the certificate to be the owner of the shares represented thereby. Such assignment or power of attorney may be either in blank or to a specified person.

B. The provisions of this section shall be applicable although the charter or articles of incorporation or code of regulations or by-laws of the corporation issuing the certificate and the certificate itself provide that the shares represented thereby shall be transferable only on the books of the corporation or shall be registered by a registrar or transferred by a transfer agent.

§ 10-233. Corporation not **forbidden** to treat registered holder as owner

Nothing in this article shall be construed as forbidding a corporation the right to:

1. Recognize the exclusive right of a person registered on its books as the owner of shares to receive dividends, and to vote as such owner.

2. Hold liable for calls and assessments a person registered on its books as the owner of shares.

§ 10-241. Warranties on sale of certificate

A. A person who for value transfers a certificate, including one who assigns for value a claim secured by a certificate, unless a contrary intention appears, warrants:

1. That the certificate is genuine.

2. That he has a legal right to transfer it.

3. That he has no knowledge of any fact which would impair the validity of the certificate.

\*

\*

\*

§ 10-249. Interpretation of article

This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

§ 10-271. Cumulative voting

At all elections for directors or trustees of the corporation, each shareholder may cast as many votes in the aggregate as he is entitled to vote under its charter, multiplied by the number of directors or trustees to be elected. Each shareholder may cast the whole number of votes, either in person or by proxy, for one candidate, or distribute such votes among two or more candidates.



§ 10-301. Trust agreement

By written agreement, certificates for shares of stock of a corporation of this state may be deposited within or without this state by the holder thereof with any person as trustee, or with a depository designated by or pursuant to the agreement to act for the trustee, for the purpose and with the effect of vesting in the trustee or a majority of the trustees, or in such person designated by or pursuant to the agreement, all or any of the voting, consenting or other rights in or in respect of the shares represented by the certificates or for any other lawful purposes specified in the agreement, and upon the terms, provisions and conditions as stated therein. A trustee may be a corporation if authorized to act as trustee.

9 Arizona Revised Statutes Annotated (1956):

§ 25-211. Property acquired during marriage as community property; exceptions; disposition of personal property

A. All property acquired by either husband or wife during the marriage, except that which is acquired by gift, devise or descent, or earned by the wife and her minor children while she lives separate and apart from her husband, is the community property of the husband and wife.

B. During coverture, personal property may be disposed of by the husband only.



Nos. 22634, 22634-A

In The  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

ESTATE OF JOHN F. NUTT, Deceased,  
Eileen M. Nutt and Frances D. Nutt,  
Executrixes,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

---

EILEEN M. NUTT,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

---

REPLY BRIEF FOR PETITIONERS

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AUG 12 1964

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REPLY BRIEF FOR PETITIONERS

---

Before responding specifically to each of the Commissioner's arguments, petitioners again ask the Court to keep in mind that these are two separate appeals by two separate taxpayers who filed two separate suits in the Tax Court after having received two separate notices of deficiency based on two separate income tax returns. In short, the cases here do not involve the determination of the tax liability of a separate tax entity known as the marital community but



the tax liability of two separate taxpayers each of whom is entitled to a determination of whether, assuming the stock in Rancho was owned as community property, he or she retained a right to reacquire the land sold to Rancho.

I

The Commissioner Has Failed To Reply To The Points That He Had Contravened Commissioner v. Brown, 380 U.S. 563 (1965) And Failed To Carry His Burden Of Proof.

At pages 30 through 34 of their opening brief, the petitioners argued that the effect of the Commissioner's regulation 1.1231-1(f) is to apply a restricted definition to the word "sale"<sup>1</sup> which violates the holding of Commissioner v. Brown, 380 U.S. 563 (1965). That case held that the word "sale" as used in the Internal Revenue Code is to be interpreted in its ordinary meaning as a transfer of property for a fixed price in money. Petitioners find no answer in the Commissioner's brief to the said contention.

Also, at pages 10 and 11 of their opening brief, petitioners contended that having departed from the ground relied on in the notices of deficiency, the Commissioner had the burden of proving that each petitioner had retained the right to reacquire his or her interest in the community land and crops which were sold to Rancho, and that the Commissioner

---

1. That the regulation attempts to define a "sale" is shown by Judge Chambers statement in the first opinion herein, 351 F.2d 452, that: "We think the regulation really defines what is a substantial sale."



has failed to carry that burden with respect to either of the petitioners and particularly with respect to Eileen M. Nutt. Petitioners have been unable to find the Commissioner's response thereto.

## II

The Commissioner Has Conceded That Assuming Arguendo That The Stock Is Community Property, Eileen M. Nutt Cannot Deal With The Community Interest Registered In Her Husband's Name And Therefore She Cannot Cause All Of The Stock To Be Voted According To Her Wishes And Thereby Reacquire The Land.

In the opening brief the Court's attention was directed by Eileen M. Nutt to the fact that she and her husband are two separate taxpayers each of whom is entitled to a ruling as to whether he or she had a right to reacquire the land sold to Rancho. The importance thereof is that when it is found that John Nutt, as manager of the community, can vote the shares in the name of Eileen M. Nutt and thereby has a right to reacquire the land, it is at the same time being found that Eileen M. Nutt has no such right. The Commissioner has found no way out of this dilemma. Instead, he says:

"Immediately after the transfer of the property to Rancho, Mr. Nutt could have directed the corporation, through his absolute voting control, to distribute the property to or for the benefit of the marriage community. Since Mr. Nutt had control of all voting stock of Rancho, and



complete dominion over it, he thus retained the right to reacquire, directly or indirectly, on behalf of the marriage community, the land and growing crops transferred to Rancho within the meaning of Section 1.1231-1(f) of the Treasury Regulations. Mrs. Nutt retained the same right through the powers, rights and duties she granted to her husband as the managing member of the marital community." (Respondent's Brief at 29). (Underscoring supplied).

In other words, Mrs. Nutt has the right to reacquire the land because her husband had complete dominion over the stock. Or to put it another way, Mr. Nutt has the right to reacquire the land because he, as the manager of the community, has "complete dominion" over the stock in Mrs. Nutt's name, and at the same time Mrs. Nutt has "retained" the same right to reacquire the land because of the power which she has given to her husband. But how does one retain a right while at the same time giving it away? And how does one have "complete dominion" over another person's stock, based on a position as manager of the community, while at the same time the "managee" retains the same right to vote the stock and reacquire the land?

Eugene Orwell was wrong. It is not going to happen in 1984 but in 1968. Why? Because the conditions Orwell described are here if Mr. Nutt's "complete dominion" over Mrs. Nutt's stock is based on his position as manager of the marital community,





and yet Mrs. Nutt also retains the right to reacquire the land because Mr. Nutt has the power to do so. Does Mrs. Nutt have the power or right to reacquire the land if Mr. Nutt chooses not to exercise his power? Is power or right based on getting someone else's permission before it can be exercised? Would the Court hold that Mr. Nutt had the power and right to reacquire the land if he has to obtain Mrs. Nutt's permission to vote the stock? If not, how can Mrs. Nutt have such a power or right when the very basis of the Tax Court's finding with respect to John Nutt is that it is he, as manager of the marital community, who has the power to vote the shares in her name whether she likes it or not.

The fact is that if Mr. Nutt obtains "complete dominion" over the stock in Mrs. Nutt's name because of his position as manager of the marital community, then Mrs. Nutt cannot have complete dominion over either the stock in her own name or in John Nutt's name. It is ludicrous to conclude that Mrs. Nutt retains the very right which is the basis of Mr. Nutt's "complete dominion."

The effort of the Commissioner to blur and obfuscate this important distinction by referring to the reacquisition of the land by the marital community should be rejected. That begs the very issue which the opinion of Judge Chambers raised in the first appeal herein. What was the point of remanding the case to find out how the stock was owned "and what were the incidents of such ownership" if the two taxpayers were being treated as a unit rather than two separate taxpayers?



A Finding That Each Petitioner Had A Right To Reacquire The Land Is A Finding That There Was No Sale And Hence Neither Of The Two Petitioners Realized Any Gain Upon Which The Commissioner Can Assert A Valid Deficiency.

This Court's first opinion focused attention on the fact that the Treasury Regulation relied on by the Commissioner actually attempts to define what is a "sale", and it must therefore follow that a finding that one has the right to reacquire the land is a finding that there was no sale. The opinion of this Court stated: "We think the regulation really defines what is a substantial sale." The petitioners agree that such is the effect of the regulation. Thus, when the Tax Court found that each petitioner retained a right to reacquire the land, it was holding that there had been no sale. Thus, neither of the petitioners could have realized gain, and the deficiencies asserted herein against them are invalid. The deficiency on the ground that there was no substantial sale should have been asserted against the corporation to whom the land and crops were transferred.

#### IV

The Commissioner Has Not Successfully Answered Petitioners' Contention That The Tax Court Erred In Holding That The Stock Owned By Each In Rancho Was Community Property Under The Control Of The Husband Who Thereby Had The Right To Reacquire The Land.

The record is clear that each petitioner could not reacquire the land transferred to Rancho. Furthermore, it is simply wrong for the statement to be made that the legislative



intention with respect to Section 1231 (b) (4) was that the section would not apply to farmers except those who were getting out of the farming business as a result of the sale. It is inconceivable that an American Congress, dedicated to the virtues and joys of rural life, would ever dream of writing into the law a plan to drive American farmers out of farming. Surely the government advocate who makes such an argument is viewing the Congress through the eyes of one raised in an urban or metropolitan area which therefore disqualifies him or her from reading the minds of those Congressional committee chairmen who dominate and rule the Congress.

However, assuming arguendo that the Commissioner's vision of the truth with respect to what Congressmen intend was the correct one, the fact is that John and Eileen Nutt were found by the Tax Court to have removed themselves from the farming business. The Tax Court held the corporation which conducted the farming enterprise (Rancho) was not a sham and that it was not to be disregarded for federal income tax purposes. Furthermore, Mr. Nutt and also Mrs. Nutt were merely employees and officers and shareholders of the "farmer" Rancho. Thus, both Mr. Nutt and Mrs. Nutt did get out of farming.

Since the Commissioner has no case at all unless he can carry his burden of proving that the stock in the name of Eileen M. Nutt was community property and that John Nutt had the right to vote that stock as he pleased, the question of whether said stock was community property is dispositive of this case. What has the Commissioner argued with respect



to the issue of whether the stock was community property?

In support of his position, the Commissioner has cited numerous cases at pages 22 through 24 of his brief, the substance of which is that property acquired during marriage is community property and that said property and its fruit retain its character, that the character of property is fixed at the time of acquisition unless altered by agreement of the parties or by operation of law. Petitioners acknowledge that as a general statement of law the statement is correct. However, it begs the point made by petitioners that here the parties did in fact have an agreement evidenced by their actions and intentions at the time the stock was issued. Thus, the controlling case on this point is Jones v. Rigdon, 32 Ariz. 286, 257 Pac. 639 (1927). That case involves facts very similar to those herein. There, the Arizona Supreme Court concluded that the husband caused or permitted a conveyance to be made to his wife. The Court said:

"The fact that a husband causes or permits a conveyance to be made to his wife tends to show that it was the intention of the parties that the property should be her separate estate ... even where it appears that the property was paid for with community funds. Contemporaneous conduct by the husband indicating his intention that his wife should have the property, coupled with the fact that the conveyance to the wife is generally held conclusive that the property was intended to be





her separate estate." (Underscoring supplied)

The Commissioner's response to the above case and language is what?

He says the case should be distinguished on the ground that in Jones v. Rigdon, supra, the facts and the deed showed that the husband intended to make a gift to his wife. Of what? Her own one-half of the community? However, assuming that is a valid distinction, the only conclusion consistent with all of the circumstances herein surrounding the issuance of the stock is that each certificate was to be owned individually and separately by each according to the name on the stock registry of the corporation and the stock certificate. Both John and Eileen Nutt participated in the issuance of the separate stock certificates, saw to it as corporate officers that the stock was recorded in the stock register of the corporation in the separate names of each, and in general clearly indicated their intention that the stock be the separate property of each. Under these circumstances the controlling case is Jones v. Rigdon, supra, which holds that it is generally held conclusive that the property is the separate estate of the person in whose name it is held.

Therefore, the cases cited by the Commissioner which say that but for an agreement between husband and wife, property acquired during coverture is community property, and that but for an intervening agreement the property retains that character, are not relevant here. The reason is that the



record here shows that the Nutts agreed and intended that the stock issued in each's name was the separate property of each.

Once the Court reaches the conclusion that Jones v. Rigdon, supra, applies, assuming that it does, then the Commissioner's case is gone.

V

Assuming Arguendo That The Stock In Eileen M. Nutt's Name Was Community Property, The Commissioner's Case Falls Because It Is Not Correct That Under Arizona Law The Husband Can Manage The Marital Community In Such A Way That He Can Vote The Stock In The Name Of Eileen M. Nutt In Such A Way As To Reacquire The Land Whether Or Not She Wishes Him To Do So.

If the stock held in the name of Eileen M. Nutt had been community property, John Nutt could still not have reacquired the land without the consent of Eileen M. Nutt.

Personal property in the form of stock is to be treated differently than personal property generally in terms of the husband's managerial powers. Therefore, the cases submitted by the Commissioner at page 26 of his brief are not material and relevant since they are all concerned with personalty generally and not with stock specifically.

Under the terms of Section 10-231 of the Arizona Revised Statutes it is provided:

"A. Title to a certificate and to the shares represented thereby can be transferred only:

1. By delivery of the certificate endorsed either



in blank or to a specified person by the person  
appearing by the certificate to be the owner of  
the shares represented thereby.

2. By delivery of the certificate and a separate document containing a written assignment of the certificate or a power of attorney to sell, assign or transfer the certificate or the shares represented thereby, signed by the person appearing by the certificate to be the owner of the shares represented thereby. Such assignment or power of attorney may be either in blank or to a specified person." (Underscoring supplied)

The Commissioner's response to the above statute is that it is all true but that the force of the statute is negated where the corporation has notice of conflicting claims as where community property laws allow transfer only by the husband though his wife is the named owner of the stock. Here again the Commissioner begs the issue of whether the corporation in fact had notice of any such conflicting claim assuming his basis for a distinction is a valid one. As the Commissioner suggests the corporation knew only what its shareholders, officers and directors knew. Thus, in this case where the two parties took the stock under circumstances evidencing an intention that it be held as separate property of each, the corporation would have no notice of a conflicting claim based on the proposition that the stock in the name of each was actually community property. Quite the opposite was true. The



Contrary to the Commissioner's position at pages 29 through 33 of his brief, a conflict exists between the general community property laws of Arizona which give the husband managerial rights over community personal property and the provisions of Sections 10-231 and 10-233 of Arizona Revised Statutes which indicate that stock issued in the wife's name is controlled by her alone. However, as stated above, Section 25.211 B of Arizona Revised Statutes provides:

"During coverture personal property may be disposed of by the husband only." (Underscoring supplied)

The above language predates Sections 10-231 and 10-233 of Arizona Revised Statutes which provide that the stock in the wife's name can be transferred and controlled by her only. Under such circumstances of conflict, the Arizona Legislature has provided in Section 1-245 that:

"When a statute or law has been enacted and has become law, no other statute or law is continued in force because it is consistent with the statute enacted, but in all cases provided for by the subsequent statute, the statute laws and rules theretofore in force whether consistent or not with the provisions of the subsequent statute, unless expressly continued in force by it, shall be deemed repealed and abrogated." Section 1-245, A.R.S.

Thus, what is involved here is a case obviously covered by Section 1-245 even though the Commissioner argues there is a conflict. There cannot be a conflict under Arizona law with





respect to the exclusive right of the wife to control, vote and dispose of stock registered in her name because under Section 1-245 of Arizona Revised Statutes, Sections 10-231 and 10-233 of Arizona Revised Statutes govern - being later in time - over Section 25.211 B of Arizona Revised Statutes insofar as the latter provides that only the husband can dispose of stock. The latter section has been abrogated with respect to stock. The same result was reached in City of Bisbee v. Cochise County, supra.

Therefore, in the instant case, stock held in the name of Eileen M. Nutt, whether community property or not, is to be controlled only by her. The law stated in Section 25-211 B of Arizona Revised Statutes has been changed to provide that: "During coverture, personal property may be disposed of by the husband only, except for corporate stock issued in the name of the wife." This being the case, John F. Nutt could not control the stock in the name of Eileen M. Nutt in such a way as to reacquire the land and crops transferred to the corporation.

With respect to the Commissioner's argument that the purpose of the Uniform Stock Transfer Act is "not primarily to determine ownership but to make uniform in the states the method of transferring title, petitioners reply is that assuming arguendo that such a statement is correct, what of it. The fact remains that the language of the section involved gives only the wife the right to control and dispose of the stock in her name.



At page 31 of his brief the Commissioner says that a reasonable interpretation ought to be given to statutes which would render them valid and operative. Yet petitioners interpretation of the statutes involved herein is the only one which gives effect to the Commissioner's suggestion. The Commissioner's view, on the other hand, negates and renders inoperative the effect of Sections 10-231 and 10-233 of Arizona Revised Statutes. Furthermore, the Commissioner is wrong in saying Mrs. Nutt could not warrant under Section 10-241 Arizona Revised Statutes that she had the legal right to transfer the stock. Why? Because Section 10-231 of Arizona Revised Statutes gives her that right.

The Commissioner's citation of Warren v. Warren, 2 Ariz. App 206, 407 P.2d 395, at page 32 of his brief, is wrong because in that case there is no finding of agreement or intention of the parties that the stock plan should be separate property. Also, the case had nothing to do with the question of whether a husband can transfer to himself and then vote community stock registered in his wife's name.

## VI

The Commissioner Has Not Shown That The Tax Court Did Not Err By Abusing Its Discretion When It Denied Taxpayers' Motion To Reopen To Receive Newly Discovered Evidence.

The ruling of the Supreme Court in Commissioner v. Estate of Bosch, 387 U.S. 456 (1967) dictates not that the Tax Court, after receiving evidence of the subordinate state



court decision, must follow the other court's decision but that the Tax Court must give proper regard to that decision. Here the Tax Court, in its almost unseemly haste to affirm its earlier decision against taxpayers, did not even want to consider the state court decision. The Commissioner's argument with respect thereto is an intriguing one. He says the Tax Court was correct because the state court proceeding was non-adversary, and because the evidence which the petitioners sought to introduce was non-persuasive. However, the Bosch case presented the Supreme Court with the question of whether the Tax Court must give attention to non-adversary proceedings in the state court. The Supreme Court held that while the Tax Court or any other federal court is not bound by the state court's adjudication, it cannot ignore the decision and must give "proper regard" thereto even though the proceedings are non-adversary. What the Supreme Court has expressly forbidden, the Tax Court has specifically done in this case. Worse yet it did it after the holding and import of the Bosch case, supra, was fully presented to it, and a plea made that such a step would go a long way toward avoiding an unnecessary remand.

And whether the evidence is non-persuasive or not is not the issue, particularly when the evidence sought to be introduced was a ruling by the state court that the stock issued by Rancho in the name of John F. Nutt was his separate property.

Therefore, for the Tax Court to have made its



decision herein without the offered evidence was another instance of error.

## VII

The Taxpayers Are Not Consuming The Court's  
Time By Rearguing The Issue Of Capital Gain  
Treatment On The Sale Of Leaseholds To Black  
Land Farms.

That this Court has the power to change its mind now with respect to the sale of leaseholds issue is too clear to require authority. The petitioners do not and did not intend to waste the Court's time rearguing the issue, but merely advanced the point so that it cannot later be said by the Commissioner that they abandoned the issue. The petitioners do not think it unreasonable to believe that this Court, unlike the Tax Court, would change its mind on an issue upon further reflection and further research.

## CONCLUSION

Each petitioner submits that the Tax Court should be reversed.

MC LANE & MC LANE

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William Lee McLane

*Nola McLane*  
Nola McLane

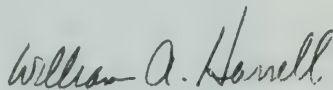
*William A. Harrell*  
William A. Harrell





CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

A handwritten signature in dark ink, reading "William A. Harrell". The signature is written in a cursive style with a large, prominent initial "W".

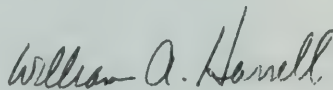
William A. Harrell

Dated: August 7, 1968



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William A. Harrell

Dated: August 7, 1968



No. 22635

In the

United States Court of Appeals

*For the Ninth Circuit*

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PETRA WILLIAMS,

*Appellant,*

vs.

FRANK J. KULIKOWSKI and MARIE ANN  
KULIKOWSKI, husband and wife,

*Appellees.*

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Opening Brief of Appellant  
Petra Williams

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**Opening Brief of Appellant**  
**Petra Williams**

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**JURISDICTION**

**(a) The District Court.**

This litigation was begun by the filing of a civil complaint for damages by Stephen A. Barzelis, Personal Representative and Administrator of the Estate of Dena Barzelis, deceased, and Katherine Cotsirilos, as plaintiffs, against Frank J. Kulikowski and Marie Ann Kulikowski, husband and wife and Petra Williams, a widow, as defendants, in the United States District Court for the District of Arizona.

At the same time Petra Williams was driving a Thunderbird automobile in a westerly direction upon Maryland Avenue, which street intersected North Seventh Avenue at right angles.

A collision occurred between the two vehicles as a result of which Dena Barzelis died from injuries received in the collision shortly thereafter. Katherine Cotsirilos was also injured as was Marie Ann Kulikowski and Petra Williams.

The administrator of the estate of Dena Barzelis sued Frank J. Kulikowski and Marie Ann Kulikowski and Petra Williams for the claimed wrongful death of Dena Barzelis and the passenger Cotsirilos sued for personal injuries. While "John Doe" Williams was sued as husband of Petra Williams it developed Mrs. Williams had been a widow since 1951.

The defendants Kulikowski cross-claimed against Petra Williams for personal injuries suffered by Mrs. Kulikowski in the accident and Petra Williams cross-claimed against Mr. and Mrs. Kulikowski for personal injuries suffered by Mrs. Williams in the collision.

The suit of Barzelis and Cotsirilos was disposed of without trial and the trial in the court below, the subject of this appeal, was upon the respective cross-claims of Kulikowski vs. Williams and Williams vs. Kulikowski. The cross-claim of the Kulikowskis sought general and special damages in the amount of \$71,725.00 plus costs of suit.

In view of the limited issues raised by this appeal we state only the ultimate facts as to the injuries suffered by Mrs. Kulikowski, viewed in the light most favorable to her and her husband.

While several physicians and a dentist attended Mrs. Kulikowski, only one surgeon, Dr. Paul James Nichols, testified as to her injuries and treatment.

Mrs. Kulikowski was seen by Dr. Paul James Nichols, a qualified orthopedic surgeon, in the emergency room at St. Joseph's Hospital shortly after the accident. (R.T. 176)

She was complaining of and had symptoms referable to her left foot and ankle and pelvis. She was oriented but in considerable pain. (R.T. 177)

Her blood pressure, pulse and respiration were within normal limits. (R.T. 178)

She had "associated bruises and contusions and lacerations that would go along with an accident of the severity that she had." (R.T. 179)

X rays were made of Mrs. Kulikowski's pelvis which revealed fractures about the inferior aspect of the pelvis on the left side. (R.T. 180)

X rays also disclosed a fracture of the talus, the bone of the foot that articulates in the ankle joint. It was a comminuted fracture. (R.T. 180)

Mrs. Kulikowski was hospitalized and the fracture of the talus was reduced by a closed reduction under general anesthesia (R.T. 181, 182) and a cast was placed on the foot to hold it in position.

She was placed on a firm mattress because of her pelvic injury; she developed pneumonia from which she recovered without difficulty. (R.T. 183) She was discharged from the hospital March 7, 1963, 47 days after her admission. (R.T. 183)

While the surgeon was concerned "about the vascular status of her foot" she never had any problems regarding that foot in terms of blood supply. (R.T. 183)

After leaving the hospital she was in a wheel chair because, in part, her pelvic fractures had not fully healed. (R.T. 183) She graduated to crutches and finally progressed to where she used a cane. (R.T. 184)

Because of some lack of blood supply the talus developed some degree of aseptic necrosis, "a fancy name for meaning that the bone has been deprived of some of its blood supply and, therefore, has lost some of its strength and, therefore, in some respects collapses a bit." (R.T. 186)

She developed a significant arthritic condition of her left ankle and arch supports and different types of shoes were used to alleviate her pain. (R.T. 187)

The pain is only associated with motion of the ankle and a fusion of the ankle joint would greatly diminish the pain. (R.T. 188) This fusion would leave her with a stiff ankle which would be without pain. (R.T. 188)

She would then walk quite well but would have some discomfort of the foot. (R.T. 189)

A fusion would involve a surgical fee of about \$350.00, an anesthetic fee of \$60.00-\$70.00, and two to three weeks hospitalization at probably \$40.00 per day. (R.T. 189, 190) Because Mrs. Kulikowski has favored her injured left foot she has a significantly smaller calf of her left leg and she testified that she suffers continued discomfort. (R.T. 190)

The Pontiac automobile was valued at \$150.00.

In the hospital after the accident she had ice packs around her head and her lips were terrifically swollen, she had cuts inside her mouth and stitches on her fingers. She was under heavy opiates. (R.T. 158)

She was in bed a month after returning home from the hospital, then used a wheel chair and crutches. (R.T. 159)

She returned to work on crutches, then used a cane about two years. At times she would go back to it. (R.T. 160)

After returning to work her foot would swell after she sat for a long time and a box was provided so she could elevate her leg. (R.T. 160)

After she returned to work she worked regularly. (R.T. 161)

Mrs. Kulikowski testified that her ribs hurt and that she was black and blue all over. (R.T. 120) Her teeth and bridge were all wedged in—a dentist came to the hospital to remove some of her bridgework and her rings were broken. (R.T. 120) Her work required that she sit all day and she had trouble getting her circulation going after sitting long periods of time—elevating her foot helped. (R.T. 122, 123)

She lost \$3,500 in wages.

Mrs. Kulikowski testified she continues to experience pain in her ankle which extends up her leg and she wears a special shoe because of her injury. She claimed additional injury—a very bad knee—but the only qualified medical expert who testified, Dr. Nichols (R.T. 173 et seq.) did not report any injury or disability, except to the ankle. This disability and pain he testified would be largely eliminated by a relatively inexpensive fusion which would leave some continuing discomfort to the foot itself since the other joints of the foot would be “used more than \* \* \* normally.” (R.T. 188, 189)

There was no testimony of claim that there was any residual disability attributable to the fracture of the pelvic bone or the injury to her mouth and her bridgework.

At the outset of the trial counsel for appellees, in his opening statement, informed the jury that Mrs. Kulikowski supports herself and her disabled husband. Appellant moved for a mistrial (R.T. 14, 15) which was denied by the District Judge as not being “sufficiently prejudicial.” Despite this indication from the Court that this inquiry was improper, counsel for appellees, well knowing what the answer would be, inquired of Mrs. Kulikowski on the

witness stand "And what does your husband do?" to which the answer was "He is a totally disabled veteran." (R.T. 109)<sup>1</sup> And, again, in his closing argument counsel for appellees referred to Mrs. Kulikowski "\* \* \* this little lady, who supports a disabled husband \* \* \*"

There was absolutely no evidence from which it could be concluded or inferred that Mrs. Kulikowski had suffered or would suffer any loss of future earnings. Indeed, the evidence was to the contrary. (R.T. 161)

There was no evidence from which the monetary value of pain, suffering or discomfort per unit of time could be measured. Yet counsel for appellees, without either the benefit of a statement of the basis of his expertise or exposure to cross-examination freely testified before the jury in his opening and closing argument as to such a standard to be utilized by the jury in reaching their verdict.

Furthermore, counsel for appellees in effect castigated trial counsel for appellant for failing to express a personal view as to the proper damage verdict of the jury and asserted, in effect, that there was something improper in this ethical delicacy on the part of appellant's counsel.

"Now, you will sit in a lot of lawsuits, and I think you will ultimately conclude, as I conclude, my duty is a twofold responsibility, one, as an officer of this court *bound by the rules of evidence, the ethics of the*

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1. In the case of *Sanchez v. Stremel*, 391 P.2d 557, 95 Ariz. 392, the Arizona Supreme Court at page 560 in the Pacific Reporter makes this statement:

"The rule in personal injury actions is that it is improper for either party to introduce evidence that he has a wife and family dependent upon him, where such evidence is immaterial, or creates sympathy or prejudice. Udall, Arizona Law of Evidence, § 111. 'Misconduct [of counsel] which is *calculated* to create sympathy or prejudice and *may* have done so justifies the grant of a new trial.' Fitzpatrick v. St. Louis-San Francisco R. Co., 327 S.W. 801, 80 A.L.R. 2d 825. (Mo. 1959, emphasis in original)."

*profession, and as an officer, a servant of the jury \* \* \** and I have never known of an adversary proceeding where an advocate did not give the jury *his best estimate, some guidelines, some thoughts, as to what is appropriate, what is fair, as a verdict. But he didn't do that, did he? He didn't do that.*" (Closing argument of Mr. Rosengren, R.T. 327, 328) (Emphasis added)

In his opening argument (R.T. 293 et seq.) counsel for appellee testified as to what was the fair and reasonable value of damage aspects of Mrs. Kulikowski's claims as to which there was no other opinion evidence in the record.

He first stated: (R.T. 293)

"The real issue, then—money damages. What is it, on behalf of Mrs. Kulikowski? Well, we know the old car was worth \$150. We agreed on that. \* \* \*

"What is the kind of relief that *I think is appropriate* for Mrs. Kulikowski? \* \* \*

"\* \* \* I am going to put them forth now in my advisory capacity as her lawyer."

Counsel then wrote on the board: (R.T. 294, 295)

"The car, \$150.

"Lost wages \$3500.

"Medical bills \$3700.

"Cost of fusion of ankle (anticipated) \$1000.

"Past pain \$15,000—(first 2 years)

(Counsel here interpolated:

*"I know from having reviewed your backgrounds that some of you are acquainted with what it means to be on crutches, and I ask you just to think about for a moment what it would be like for a woman who doesn't have the musculature of a man, it's even more difficult to ambulate \* \* \*")* (T.R. 295) (Emphasis added)



Counsel then said: "I am suggesting to you that for the first two years \* \* \* that \$7,500 a year is not inappropriate."

"Past pain (last three years prior to trial) \$2000. per year (I am suggesting that that pain at the sum of \$2000. a year.)"

\$6000.

Counsel then stated: (R.T. 296)

"There is a lot of these things, *and I want you to rely on your own experience*, your own wisdom, but I do not think it would be appropriate to shunt aside what excruciating pain was." (Emphasis added)

Future pain (counsel stated "\* \* \* and his Honor is going to tell you *her life expectation* is 25 years. \* \* \* I am suggesting \$2000. a year for *her life expectation*. \* \* \* All right. Future pain, \$2000. a year, 25 years, that's \$50,000.")

"Now, then, what is left? \* \* \*—so I am saying for her earning capacity, injury to her earning capacity, a thousand dollars a year for her 12 remaining years at work because she is what, she is 53. We assume she will retire at 65.

Loss of earning capacity \$12,000.

"Add it up, and if my arithmetic is not incorrect, \$91,350." (R.T. 298)

Counsel then said: (R.T. 298)

"\* \* \* I would like to leave you with this thought as regards the \$91,350.00 verdict, that *I think it is fair and equitable*." (Emphasis added)

Counsel then followed this testimony as to his opinion as to the value of the various intangible injury aspects of Mrs. Kulikowski's claims with a reference to the value of property rights—inanimate things, the plain thrust of which was that his valuation of the injuries suffered by Mrs. Kulikowski was equally valid as the valuation of the



damage to Mrs. Williams' car or other property having a recognized market value.

In his closing argument counsel for appellees argued:

"And Mr. Perry specifically accused me, and I wrote it down, of chicanery and legerdemain. Well, chicanery is close to fraud, and legerdemain is trickery. And what for? In putting on the board specific sums of money that *I think are fair, just, equitable and appropriate.*

Mr. Perry: "Excuse me, if the Court please. We object. It's not within the realm of proper rebuttal.

The Court: I think he may proceed." (R.T. 327) (Emphasis added)

(Then followed the argument criticizing Mr. Perry's failure to express his personal opinion referred to supra.)

While the entire tenor of the argument of counsel for appellees in opening and closing was couched in the format of an emotional appeal with overtones of "You are here to right wrongs, and you have broad latitude to ameliorate a hardship", (R.T. 339) this approach, standing alone, would not justify this appeal. However, it set the stage for the jury's blind acceptance of counsel's unsworn and unwarranted testimony as to his opinion as to what damages would be "just, fair, equitable and appropriate."

Counsel for appellees' opinion as to a "fair, just, equitable and appropriate" verdict—\$91,350.00.

The jury's verdict? \$91,350.00 for a damaged left ankle.

## **SPECIFICATION OF ERRORS RELIED UPON**

### **I**

The denial by the District Judge of appellant's Motion for a New Trial constituted an abuse of discretion as a matter of law for the reasons:

1. The jury's verdict was grossly excessive in allowing damages in the amount of \$91,350.00 for an injury

settled in England before the foundation of this colony, and has always existed here without challenge under any of our constitutions. It is a power to examine the whole case on the law and the evidence, with a view to securing a result, not merely legal, but also not manifestly against justice,—a power exercised in pursuance of a sound judicial discretion, *without which the jury system would be a capricious and intolerable tyranny*, which no people could long endure. This court has had occasion more than once recently to say that it was *a power the courts ought to exercise unflinchingly.*’” (Italics supplied by Court) 166 F.2d at 407, 408

This is and should be particularly true when the record discloses that unsworn, opinion evidence, injected into the case against the backdrop of an inflammatory argument of counsel has been the springboard which catapulted the jury's damage views above the horizon of reason and a fair appraisal of the injuries of the appellee.

#### **The Verdict and Judgment Is Grossly Excessive.**

The net of appellee's present injury is a damaged left ankle. There is no claim or evidence of any continuing pain or disability from any of the other injuries appellee suffered. Dr. Nichols testified that a relatively simple fusion operation costing in total about \$1000. would free the ankle from continued pain and, while there would be some continuing discomfort, it plainly would not be serious.

*The jury allowed, at counsel's urging, the cost of this operation and also, at counsel's urging, pain and suffering for 25 years as if the operation were not performed.*

In effect the jury awarded \$50,000. in damages for the pain and suffering associated with the condition of the ankle at the time of the trial, a condition which was only

temporary and subject to almost complete amelioration with the funds for this operation also provided by the jury's verdict.

Appellant respectfully urges that the test for reversal by a Court of Appeals of a District Judge's refusal to grant a new trial for abuse of discretion as a matter of law has been met.

**The Verdict of the Jury Made an Allowance for Injury to Appellee, Mrs. Kulikowski's Earning Capacity with No Evidence to Support Such an Allowance.**

The record is clear that appellee, Mrs. Kulikowski, once she returned to work, worked regularly. (R.T. 161) Her work did not require that she be on her feet or to move around while working (R.T. 122) She recovered in full for her loss of wages while off work—\$3,500.00—and lost no wages after she returned to work, yet, at counsel's urging the jury allowed her \$1,000.00 per year for loss of wages which to date of trial *she had not lost* and as to which there was no evidence she would ever suffer any loss. Add to this the \$50,000.00 allowed by the jury, also at counsel for appellees' urging, for 25 years of pain and suffering which was to be obviated by an ankle fusion operation financed by funds also included in the verdict of the jury and it is clear that \$62,500.00 of the jury's verdict is wholly without substantial or any real support in the evidence.

**The Unsworn Opinion Testimony of Appellees' Counsel.**

Canon 15, Canons of Professional Ethics, provides, in part:

“It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause.”

The application of this canon is clear but we need not rest upon considerations of ethical propriety to support a finding that gross error was introduced into the case by the conduct of counsel for the appellees. That such error was most prejudicial does not admit of doubt when the total of the damages counsel advised the jury in his opinion would be "fair, just and equitable" is compared with and found to be *the exact amount of the verdict of the jury*.

We need not seek to persuade the Court to become involved in the controversy sparked by *Botta v. Brunner*, 26 N.J. 82, 138 A.2d 713 (1958). This appeal does not involve an objective use of the "unit of time" argument by counsel for a personal injury plaintiff; it involves the injection by a plaintiff's counsel of his unsworn opinion evidence as to the fair damage award which a jury should make for various injury claims of the injured client. Whether we relate this improper tactic to a "unit of time" plus blackboard argument or *to any other expression of counsel's personal opinion* as to the decision which the jury in their deliberations should reach, it is plain wrong and reversible error.

To place the problem in its true posture:

Suppose Mr. Rosengren prior to resting his case had called a prominent attorney specializing in handling personal injury claims for plaintiffs as a witness and posed a hypothetical question to him, as an expert in personal injury damage awards, as to what in his opinion would be a fair, equitable and appropriate award to appellee Kulikowski for her various claimed injuries. Certainly no Court in the land would permit such testimony and, if permitted, certainly no Appellate Court in the land would hesitate to reverse out of hand a judgment bottomed upon such testimony.

Was not the action of counsel for appellees himself testifying, for testify he did, as to what in his opinion a

fair award would be for pain and suffering, loss of earning capacity and related unliquidated damage claims equally prejudicial to the expert's suggested testimony?

Is his testimony legally more palatable because it was unsworn?

Should it be considered less harmful because he did not assume the role of a paid expert witness testifying from the witness stand and exposed to cross-examination?

In fact, did he not worm his way into the confidence of the jury with his repeated assurances of his fairness, his desire that the jury do justice, that if Petra Williams be entitled to recover that the jury award her *full* damages? And then, in the role of an expert adviser, a "servant of the jury" (R.T. 327) infect the entire integrity of the trial with unsupported, overreaching expressions of his opinion as to what would be fair and just when he was in fact a paid witness with his compensation related directly to the amount by which he could inflate the jury's verdict.

In the early case of *Union Pacific R. Co. v. Field*, 137 F. 14 (C.A. 8), the Court said:

"In the case at bar the zeal of counsel for the plaintiff carried him beyond the limits of fair argument, presented to the jury facts that were not in evidence, and insinuated a misleading measure of damages. The vice of his action was not extracted by retraction, or by any specific charge of the court. It is not uncertain that it was not prejudicial to the defendant; nay, it is probable—almost certain—that it was prejudicial. The trial therefore was not fair and impartial, and the defendant is entitled to another."

We see no point in parading cases before the Court in endless review merely to demonstrate either our learning or our energy.

The principles governing a Court of Appeals in reviewing the denial of a Motion for a New Trial by a District

Judge because of excessive damages allowed by a jury, which allowance was procured through improper injection of unsworn opinion evidence of counsel in argument to the jury, are well known. Each case must be judged upon its peculiar facts. Appellant has not found any precedents sufficiently in point on the facts to be helpful.

### CONCLUSION

It is respectfully urged that appellant Petra Williams, for all the reasons above stated, was denied a fair trial; she "should have another one."

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*Attorneys for Appellant*

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

MARK WILMER  
*Attorney*







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No. 22635

**In the**  
**United States Court of Appeals**  
***For the Ninth Circuit***

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PETRA WILLIAMS,

*Appellant,*

VS.

FRANK J. KULIKOWSKI and MARIE ANN  
KULIKOWSKI, husband and wife,

*Appellees.*

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**Appellees' Answering Brief**

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**JURISDICTION**

**(a) The District Court.**

That the court had jurisdiction was stipulated and agreed by all parties, both as to the principal litigation involving Stephen A. Barzelis, Personal Representative and Administrator of the Estate of Dena Barzelis, deceased, and Katherine Cotsirilos, as plaintiffs, and Frank J. Kulikowski and Marie Ann Kulikowski, husband and wife, and Petra Williams, a widow, as defendants. There was also agreement concerning the jurisdiction of the cross-claims of Kulikowski and Williams, which claims were ancillary to the principal litigation involving a death and serious injuries.

The claims of Barzelis and Cotsirilos had been tentatively settled at the time of the trial, although final settlement

papers were not signed until sometime after the Kulikowski-Williams trial was completed. Hence, the form of judgment ordered signed by the District Court Judge (A.R. 26-27).

There has never been any question as to the jurisdiction of the court to try the ancillary issues raised in Kulikowski v. Williams, and the statutory jurisdiction is firmly supported by case law. *Murphy v. Kodz*, 351 F.2d 163 (9th Cir. 1965).

**(b) This Court.**

Jurisdiction in this Court of this appeal is conferred by Section 1291, Title 28, U.S.C.

**STATEMENT OF THE CASE**

The jury resolved the issue of who was negligent in running the red light, and nothing more need be said in support of its verdict. Appellant's statement of the case concerning Mrs. Kulikowski's injuries is essentially correct, except for the deletion of certain significant residual elements. They are:

1. When Mrs. Kulikowski sleeps at night, the back of her head and hips bother her. (R.T. 124)
2. Mrs. Kulikowski has a permanent crippling and disabling injury. (R.T. 189)
3. She walks with a limp. (R.T. 127-128)
4. There is marked and significant atrophy of her left calf. (R.T. 190)
5. Her activities at work are curtailed in that she must walk around the block, and periodically and intermittently elevate her left leg. (R.T. 122-123)
6. Mrs. Kulikowski must periodically get up and walk in order to increase the blood supply into the left ankle. (R.T. 125)

7. Her injury obviously gives her less agility. (R.T. 128)
8. She has lost her normal walking gait. (R.T. 128)

### **RES ADJUDICATA OR ESTOPPEL**

Trial counsel for Appellant, Roger Perry, settled Appellant Petra Williams' crossclaim against appellees while the jury deliberated. See affidavit of Kenneth Rosengren, counsel for Appellees, attached herein as Appendix A.

This contractual action has then forever barred and precluded a retrial of this case in its form presented to the trial court below. This fact of adjudication and disposition of the claim constitutes an estoppel or amounts to res adjudicata of the matter. Hence, there is no basis for this appeal. *Di Orio v. City of Scottsdale*, 2 Ariz.App. 329, 408 P.2d 849 (1965).

### **ARGUMENT OF THE CASE**

#### **1. Excessiveness**

This court has dealt with the subject of excessiveness concerning Arizona death and injury cases on past, but recent occasions. As late as 1967, in *United States v. Becker*, 378 F.2d 319 (9th Cir.), this court said:

“\* \* \* In Arizona, the fact-finder's damage award may not be overturned as excessive except where it is “\* \* \* so excessive as to strike mankind, at first blush, as being beyond all measure, unreasonable, and outrageous \* \* \*.” *Fulton v. Johannsen*, 3 Ariz.App. 562, 416 P.2d 983, 988.”

This standard of appraisal is applicable to both death and injury cases. *Siebrand v. Gossnell*, 234 F.2d 81, 94 (9th Cir. 1956).

Also, see *Young Candy & Tobacco Company v. Montoya*, 91 Ariz. 363, 370, 372 P.2d 703, wherein the court said:

“\* \* \* The damages, therefore, must be so excessive as to strike mankind, at first blush, as being beyond all measure, unreasonable, and outrageous, and such as manifestly show the jury to have been actuated by passion, partiality, prejudice, or corruption. In short, the damages must be flagrantly outrageous and extravagant, or the court cannot undertake to draw the line, for they have no standard by which to ascertain the excess.”

The question of excessive damages was also considered in *Meyer v. Ricklick*, 99 Ariz. 355, 409 P.2d 280 (1965), at page 357, where the court said:

“The size of a verdict in a personal injury action is not alone sufficient evidence of prejudice and passion on the part of the jury. *Keen v. Clarkson*, 56 Ariz. 437, 108 P.2d 573. The amount of damages for personal injury is a question particularly within the province of the jury. *Wise v. Monteros*, 93 Ariz. 124, 379 P.2d 116. The jury’s judgment is to be sustained unless it is so exorbitant as to indicate passion, prejudice, mistake or a complete disregard of the evidence and instructions of the court. *City of Yuma v. Evans*, 85 Ariz. 229, 336 P.2d 135.”

Further, at page 356, *Meyer v. Ricklick*, *supra*:

“In an action for personal injuries, the law does not fix precise rules for the measure of damages but leaves their assessment to a jury’s good sense and unbiased judgment. *Young Candy & Tobacco Co. v. Montoya*, 91 Ariz. 363, 372 P.2d 703; *Rodgers v. Bryan*, 82 Ariz. 143, 309 P.2d 773. Where there is conflicting evidence as to the extent of a motorist’s injuries in an automobile collision, it is a question for the jury. It is not for the trial court nor for appellate court on appeal to determine the amount of money which would compensate plaintiff for her injuries. *Keen v. Clarkson*, *supra*. See also, *Pierson v. Hermann*, 3 Ohio App.2d 398, 210 N.E.2d 893.”



Since this Court has cited *Fulton v. Johannsen*, 3 Ariz. App. 562, 416 P.2d 983 (1966), with approval, it is appropriate to point out that the appellate courts have a right to take into account attorney's fees in considering excessiveness of the personal injury judgment. In *Alabam Freight Lines v. Thevenot*, 68 Ariz. 260, 204 P.2d 1050 (1949), and *Fulton v. Johannsen*, *supra*, the court said:

"In addition he will have to pay his attorneys for their work. While we don't know the amount of their fee, it is reasonable to expect they will collect the usual percentage of recovery in cases as this, which will in turn lower his recovery."

Here is a summary of the impact of the injuries upon Mrs. Kulikowski, who was forty-seven (47) years of age at the time her injuries were sustained, and who worked as a verifier for the Industrial Commission of the State of Arizona.

1. She is in constant pain five years after the accident. (R.T. 128)
2. She has a sit-down type of job, and she has to keep her foot elevated and resting on a box while at work. (R.T. 122)
3. Periodically she must get up and walk around in order to exercise the ankle to keep it from swelling further. (R.T. 122-23)
4. It bothers her to sit down as much as is required. (R.T. 122)

Apart from her disabled and crippling ankle injury, Mrs. Kulikowski summarized her condition five years after the accident in the following dialogue:

"Q. Aside from the problems and difficulties with your ankle, you have pretty well recovered, have you not, from the other injuries that you sustained?

A. Pretty well recovered, except that when I sleep at night, my hips bother me and the back of my head. I just have this trouble, so I wake up quite often at night. But the main fact is my foot that gives me so much trouble.

Q. All right. Would you describe for the jury what—how that foot bothers and how it troubles you and what kind of pain you experience with it?

A. The thing with it is it just blows up and swells up at the ankle, and then all the ligaments all around the side of the leg, and everything else, whenever it gets bad, when I step on it, it's like a badly sprained ankle. It can't hold me, and it pains me terribly; and the only way to relieve the pain, I have to get up and keep walking to circulate—to get most of the pain off of it because it's the circulation. Then it goes all the way up to my knee. I have a very bad knee from it where I can't even put any weight on the knee on it, and it's just like a long pain all the way from the knee to the ankle, and it even gets into my hip." (R.T. 124-125)

In addition to suffering constant pain, Mrs. Kulikowski has a crippling limp:

"Q. Now, does this disability with your ankle cause you to limp a little bit?

A. All the time.

Q. And why do you limp then, because of the pain?

A. Of the pain, because whenever I step on it, from the heel and in through the ankle, I always—it just pains. I can feel a shooting pain; and I walk slowly, I feel better. As soon as I try to go a little faster, it starts hurting; so I just learn from experience and if I just walk slow, I don't suffer so much."

Q. Is this pain more or less a constant thing, Mrs. Kulikowski?

A. It is. And I have noticed that the—when I sit all week, and then when I get home and over the weekend where I try to accomplish more, stay on my feet too

much, then when I get up the next morning, I can't put any weight on my feet at all. Like if I work all day Saturday, I have an awful time. Then I limp very badly, and the pain is much worse.

And like Dr. Nichols told me, I can't give it too much exercise or I can't overdo it; and then I need circulation, so I need to meet a happy medium. But in my work I can't get it organized that way."

Dr. Nichols verified that Mrs. Kulikowski was in constant pain five years after the accident in his testimony (R.T. 187), wherein he said:

"Q. \* \* \* She complains of constant pain, doctor. Is that consistent with this type of injury?

A. Well, I think it is inasmuch as by examination and x-rays Mrs. Kulikowski has developed a significant arthritic condition of her left ankle."

Dr. Nichols was concerned about the significant traumatic arthritis, which because of the severity of the injury came on in a relatively rapid fashion (R.T. 186-87), and the marked atrophy or shrinking of her left calf (R.T. 190), all caused by the constant limping.

The only way to relieve Mrs. Kulikowski's pain is the impractical solution of keeping her in bed or in a position where she does not have to work. In the event the pain becomes so progressively severe that she is no longer able to walk, then and only then does Dr. Nichols plan to do the radical surgical procedure known as the fusion operation (R.T. 188). This carries with it, of course, the proposition of an ankle which would have absolutely no motion at all. Dr. Nichols testified that a fusion operation is in no way a 100% affair, that it is not a routine surgical procedure, and if the fusion operation was performed, Mrs. Kulikowski would not be free of discomfort or pain in the foot because

the joints that were then being used would be used more than they normally would because they are taking up the motion of the ankle joint that has been fused (R.T. 189).

Appellant is incorrect in contending on Page 12 of her Opening Brief that a fusion operation would make Mrs. Kulikowski's ankle "painfree." It would markedly diminish her pain, but it would not eliminate it.

The hospital records, an exhibit in the case, shed further light on some of Mrs. Kulikowski's injuries.

Dr. Nichols was but one of her treating physicians. Others were: Phillip William Kantor, M.D.; Sam Schwartz, D.O.; Leonard R. Karp, D.D.S.; Sidney H. Segal, M.D.; A. E. Cruthirds, M.D.; W. J. Nelson, M.D.; James C. Zemer, M.D. (R.T. 123-24).

Mrs. Kulikowski had soft tissue injuries—bruises, contusions and lacerations aside from the ankle fractures which have been discussed (R.T. 179); her mouth, teeth and bridgework were injured (R.T. 120-158); she contracted pneumonia (R.T. 183); her hands and fingers were injured (R.T. 120-158); multiple fractures of the pelvis (R.T. 180), and because of the trauma, Mrs. Kulikowski had hypertension and anxiety (R.T. 179).

Mrs. Kulikowski was bedridden until about April, in a wheelchair for about three months, and used a couple of crutches until the middle of September. Finally graduated to one crutch, which she used for about six months, and then a cane for a couple of years, and now uses her cane intermittently and periodically when the pain is unbearable (R.T. 120-21).

This accident affected her looks, her appearance, and its aging impact was brought out by the witness Thressie McCarty, who said:

"As far as I know, she *was* very healthy. She was very active." (R.T. 157) (Emphasis added)

"She *was* a young woman. She acted like a young woman." (R.T. 157-58) (Emphasis added)

Mrs. McCarty further testified that after the accident:

"Well, *I walked over to the bed and in plain words, she was a mess.* She had ice packs all around her head, her lips were terrifically swollen, and they were almost turned back, and you could see cut places inside her mouth. Her hand was laying on the outside of the coverlets, and I could see stitches on her fingers; and I thought she was under heavy opiates or else she was unconscious because I don't think she ever knew I was there." (R.T. 158) (Emphasis added)

"\* \* \* In sitting so long her foot would swell, and the maintenance man and some other men made her a box where she could elevate that leg; and, of course, it was quite uncomfortable to have her leg out stiff and you are key punching, you know. She had a time." (R.T. 160)

The amount of injuries and their impact as well as the crippling effect upon Mrs. Kulikowski could best be appraised by the jury and the court, who lived through the courtroom atmosphere. The jury was in the best position to appraise Mrs. Kulikowski's concern, anxiety, and apprehension in not being able to perform her job with complete effectiveness (R.T. 122-23). Likewise, the amount of shrinkage and atrophy to her left calf (R.T. 190), and the aging effects and impact of all these injuries on this young woman (R.T. 157-58).

*Appellant embarked on no cross-examination of the medical expert and presented no medical testimony or medical evidence.*

The case was not stripped of the human equation nor devoid of atmosphere and drama, nor is any trial, as was said in *Maryland Casualty Co. v. Reid*, 76 F.2d 30, 32 (5th Cir. 1935):

"It affects the witnesses, the lawyers, the litigants, the triers themselves. It is entirely true that many verdicts in criminal and in civil cases find their real spring in an atmosphere generated by the trial, where things felt but unseen, sometimes real, sometimes illusory, arising out of but more than the relevant testimony, in the end induce the verdict more than the testimony itself does."

Based upon the foregoing, how can it be said that this verdict is excessive by *any* standard, let alone the yardstick which binds this court, to-wit:

"\* \* \* so excessive as to strike mankind, at first blush, as being beyond all measure, unreasonable, and outrageous." *United States v. Becker, supra*.

## 2. Earning Capacity Issue.

Before the jury received the case, counsel conferred with the court and agreed to the instructions that were to be given. These instructions included an instruction concerning future medical expenses and an instruction concerning the loss of or decrease in earning power or capacity (R.T. 348-49). *There was no objection to any of the instructions given to the jury, including the instruction concerning injury to or loss of earning capacity.* At the conclusion of the case, the judge called counsel to the bench and, outside of the hearing of the jury, asked counsel:

"THE COURT: Does the defendant or in this case cross-claimant, Petra Williams, have any further objections to the instructions the court has read?"

MR. PERRY: *No, your Honor.*" (R.T. 352)

Hence, counsel cannot now at this late date complain about that instruction. See *Orlando v. Northcutt*, ..... Ariz....., 441 P.2d 58 (1968).

Furthermore, under the evidence, the instruction was warranted. As a result of the accident, Mrs. Kulikowski—

1. Has a permanent, crippling and disabling injury (R.T. 189);
2. Walks with a limp (R.T. 127-28);
3. Has marked and significant atrophy of her left calf (R.T. 190);
4. Is curtailed in her activities at work in that she must walk around the block and periodically and intermittently elevate her left leg (R.T. 122-23);
5. Gets up periodically to walk in order to increase the blood supply into the left ankle (R.T. 125);
6. Has an injury which obviously gives her less agility (R.T. 128); and
7. Has lost her normal walking gait (R.T. 128).

Her doctor testified that this is a permanent condition with or without a fusion operation (R.T. 189).

Under such circumstances, the jury could reasonably find from such evidence that this type of injury would result in decreased earning power. As was said in *Atchison, Topeka and Santa Fe Railway Co. v. Parr*, 96 Ariz. 13, 19, 391 P.2d 575 (1964):

“\* \* \* Even if the prospective operation were completely successful, there would be a ‘permanent disability and stiffness of the foot.’ This would result, \* \* \* in less endurance, a decrease in agility, poor balance and coordination, less ability to tolerate jumping on the foot, and loss of normal gait. A jury could reasonably find such evidence that this kind of permanent injury would result in decreased earning power \* \* \*.”

The only two parties in court were Mrs. Petra Williams, a widow with three children (R.T. 280), and Mrs. Kulikowski, who is married to a totally disabled American veteran (R.T. 109). In Arizona a personal injury award is community property, and Frank Kulikowski is a party. Mrs. Kulikowski was the breadwinner in her family as was Mrs. Williams



in her family. Mrs. Kulikowski has been working at the Industrial Commission for over sixteen years (R.T. 109). The fact that Mrs. Kulikowski was obliged to work in order to support herself and her disabled husband was a material and relevant fact in the case (R.T. 121), and since it had bearing on her returning to work prematurely before she should have and while she was in such poor physical condition (R.T. 160). The reason for her working was an ingredient in the lawsuit.

Her worry, concern, anxiety, and hypertension concerning her activities and household duties and responsibilities were germane and material and necessary background.

Mrs. Kulikowski's lot in life was an adjunct to the proof. She is not to be penalized for having a disabled husband, and the jury was entitled to know her family circumstances just as it was entitled to know that Mrs. Williams was a widow with three daughters (R.T. 195). Were Mrs. Kulikowski to appear in the role of "Madam X" with no basic background facts supplied, the jury might well wonder why everyday common information was suppressed or hidden from them.

*The evidence concerning Mrs. Kulikowski's having and supporting a disabled husband entered the case without objection from appellant's counsel, as set forth in the transcript:*

"BY MR. ROSENGREN :

Q. And what does your husband do?

A. He is a totally disabled veteran." (R.T. 109)

"BY MR. ROSENGREN :

Q. You were out of work for how many months?

A. Nine months.

Q. And then you went back?

A. Then — yes, I went back. I had to go back, my husband is disabled." (R.T. 121)



"BY MR. PERRY:

Q. All right. Was there any restriction on your driver's license?

A. No, sir.

Q. Did your driver's license require that you drive a car only with an automatic transmission?

A. Yes, sir.

Q. Why was that?

A. Well, my husband is disabled, and that is the only car he could drive, so we had that one car so both of us could drive it." (R.T. 136-37)

Appellant cites *Sanchez v. Stremel*, 95 Ariz. 392, 391 P.2d 557, which contains dicta wholly unrelated to our fact situation in Kulikowski. In *Sanchez*, the court said at page 394:

"Throughout the trial plaintiff's counsel made improper attempts to blacken the characters of defendant and his passenger, and about half of the trial was taken up by his attempts to go into irrelevant matters. Plaintiff's counsel acted as if this were an alienation of affections suit, and not an automobile accident case."

The occupation of the plaintiff Frank Kulikowski, or the lack thereof, is relevant and material. It is necessary background. It has the same degree of relevancy (he being a party and an indispensable one under Arizona law) as Mrs. Williams being a widow (R.T. 192-280) and a self-employed interior decorator (R.T. 193-280), who had her three daughters to look after (R.T. 195).

The Kulikowski case is thus distinguishable from *Sanchez v. Stremel*, *supra*: Mrs. Kulikowski had to support her husband; the reasons for her working were material and relevant; her concern and anxiety was material and relevant, and the issue was in no wise brought forth to inject prejudice. The trial court is in the best position to determine the issue of whether or not a party is attempting to interject

prejudice and/or contrast the wealth of the parties. *Tanner v. Pacioni*, 3 Ariz. App. 297, 413 P.2d 863 (1966).

Furthermore, in Arizona the trial judge is vested with considerable discretion in determining the relevancy and admissibility of evidence. *City of Phoenix v. Boggs*, 1 Ariz. App. 370, 373, 403 P.2d 305 (1965).

An oft quoted case in the Federal System concerning damage or injury to earning capacity is *Mabry v. Travelers Insurance Company*, 193 F.2d 497 (5th Cir. 1952), wherein Judge Edwin Holmes stated:

“Pinched by poverty, beset by adversity, driven by necessity, one may work to keep the wolf away from the door though not physically able to work; and under the law in this case, the fact that the woman worked to earn her living did not prevent the jury from finding, from the evidence before it, that she was totally and permanently disabled while she was working.”

### **3. The Alleged Misconduct of Appellees' Counsel.**

The main thrust of appellant's appeal is that there was improper argument, yet *no objection was made to counsel's arguments concerning damages, and no objection or exception was made to the use of a chart illustration. Appellant took no exception, nor did appellant move for mistrial on these grounds.* Counsel for appellant did nothing. Instead he characterized the use of the chart as “mathematical legerdemain” and “chicanery.” (R.T. 317)

He never asked the court for curative instruction nor did he request the court to admonish the jury concerning the subject. He in short waived error, if any. Appellant is fore-stalled and precluded from raising the issue at this time.

In *Maryland Casualty Co. v. Reid*, *supra*, at page 33, the court said:

“Ordinarily, if his counsel fails to adequately object, or fails to except to adverse action on his objection, a litigant may not complain of what occurred as error, for he will be treated as having assented to it. On the other hand, a trial judge may never abdicate his function, or surrender to counsel the conduct of the trial. It is still his primary duty to oversee and conduct it. Because this is so, he may, and if he fails to, the appellate court may, though no objection is made and no exception taken, correct an error of abdication which has resulted unjustly, by voiding the trial. But this will be done only in extreme cases, where the judge’s error in permitting the trial to get out of bounds, instead of exercising his function to guide and control it, is of such transcendent influence on the course of the trial as that, though not excepted to, justice requires its being noticed and corrected. One, therefore, who brings an appeal here in a case at law must show either an unexcepted to error of abdication so glaring that its effect upon the conduct of a trial may not be doubted, or that he had recourse to and exhausted all the means and aids to obtain relief available below.”

In Appellant’s memorandum of points and authorities in support of her motion for new trial, the thrust of her argument was that the use of the blackboard in argument violated *Botta v. Brunner*, 26 N.J. 82, 138 A.2d 713, 60 ALR2d 1331. The one United States Court of Appeals case which supported that position—*Johnson v. Colglazier*, 348 F.2d 420 (5th Cir. 1965)—has now been overruled. In *Baron Tube Company v. Transport Insurance Company*, 365 F.2d 858 (5th Cir. 1966), the entire Circuit, sitting en banc on March 1, 1966, specifically reversed *Johnson v. Colglazier*, *supra*, and cited *Maryland Casualty Company v. Reid*, *supra*, with approval. The United States Courts of Appeals are now *unanimous in not following Botta*.

The complaint is made that counsel for appellees is guilty of misconduct in putting forth suggested figures that were in his view fair and equitable. However, that very course of conduct was sanctioned and approved in *Rush v. Cargo Ships & Tankers, Inc.*, 360 F.2d 766 (2nd Cir. 1966), wherein the court said:

“Finally, appellant suggests that it was reversible error when the court refused to charge the jury to ignore plaintiff’s counsel’s argument concerning a unit of time or per diem measurement of damages for pain and suffering. Despite the fact that the great weight of authority adopts a flat rule, either approving or disapproving such argument, see the cases collected in *Johnson v. Colglazier*, 348 F.2d 420 (5th Cir. 1965), we are unwilling to adopt such a rule. See *Pennsylvania R. Co. v. McKinley*, 288 F.2d 262 (6th Cir. 1961). We do not necessarily agree, however, with that language of McKinley which suggests that the appellate court will reverse only if there resulted ‘a miscarriage of justice or deprived one of the parties litigant of a fair trial.’ 288 F.2d at 267.

“We do hold that under the circumstances of this case as disclosed by the record before us, it was proper to deny the request. While the argument itself was not reported, and therefore is not before us, a circumstance we regret, there is no suggestion that there was an improper appeal to passion and prejudice other than the bare words used. *Furthermore, as the trial judge noted, plaintiff’s counsel indicated that his figures were only suggested, that the jury might find them too high or too low, and that it was the jury’s determination that controlled.*” (Emphasis added)

Essentially, the language emphasized above in *Rush v. Cargo Ships & Tankers, Inc.*, *supra*, was used in argument by counsel for appellee, and there was no objection or exception to it at the time:

"I think I am going to be asking for figures that you think will be fair and equitable and just ; and if you do not think that they are fair and equitable and just, then I want you to come in with some other figures. But I am going to put them forth now in my advisory capacity as her lawyer." (R.T. 294)

Furthermore, the *Rush* case was appealed to the U.S. Supreme Court, certiorari denied, 385 U.S. 961 (1967).

In the Federal system, the case of *Pennsylvania Railroad Company v. McKinley*, 288 F.2d 262 (6th Cir. 1961), the Court of Appeals upheld a plaintiff's verdict where the per diem argument was used. The court said:

"Briefs of counsel suggest that in our decision of the instant appeal we must choose between the so-called Botta rule and those authorities which appear to approve what was done by plaintiff's counsel in this case. It is urged that from this choice we must fashion and adopt for this court a rule of practice that will control trials that follow our decision here. We decline to do so. Although defendant's motion for a new trial averred that the verdict was excessive, no such claim is made on this appeal. We, therefore, find it unnecessary to announce a procedural blueprint to be followed in all future trials. The jury's verdict was indeed a large one, but the judge who presided at the trial and who heard the evidence did not find it excessive. Control of the conduct of counsel so as to keep it within the limits of legitimate advocacy is primarily the duty and responsibility of the trial judge. We will not find error in his discharge of such duty unless we are persuaded that what he did, or failed to do, in matters within his discretion resulted in a miscarriage of justice or deprived one of the parties litigant of a fair trial. \* \* \*"

While the propriety of argument is a federal question and a matter of federal procedure, *Baron Tube Company v.*

*Transport Insurance Company, supra*, the Arizona cases would not give appellant comfort. In *Myers v. Rolette*, ..... Ariz. ...., 439 P.2d 497 (1968), the court said:

“For convenience of discussion, we shall combine the three remaining questions raised by the appellant as they all have reference to the same general subject of damages. In plaintiff’s closing argument to the jury, he presented the issue of damages through a chart utilizing what has been characterized as the “formula method” or “per diem method” of computation of damages. There was no objection to the plaintiff’s use of the charts and during defendant’s argument to the jury counsel referred to the figures in plaintiff’s chart in an attempt to demonstrate their inaccuracy. At no time during the trial did defendant object to the use of the chart and the method of computation. Defendant’s failure to object constituted a waiver. *Beliak v. Plants*, 93 Ariz. 266, 379 P.2d 976 (1963).”

The use of charts generally has been sanctioned in Arizona courts specifically in *O’Rielly Motor Company v. Rich*, 3 Ariz.App. 21, 411 P.2d 194 (1966).

The Arizona courts, like the federal courts, give counsel broad latitude in discussing in argument to the jury facts supplied by the evidence and inferences to be drawn therefrom. *Aguilar v. Carpenter*, 1 Ariz.App. 36, 399 P.2d 124 (1965); *Beliak v. Plants*, 93 Ariz. 266, 379 P.2d 976 (1963); and *City of Phoenix v. Boggs*, 1 Ariz.App. 370, 403 P.2d 305 (1965).

The court admonished the jury on a number of occasions that the arguments of counsel were not evidence. The court prefaced the arguments of counsel with the following statement:

“I would remind you, as I have said earlier, that statements of counsel are not evidence. The facts in this case are as you determine them to be; and regardless of what counsel may inadvertently say, and if you feel

that the facts are different than counsel may represent the facts to be or have been, it's, of course, your determination that counts." (R.T. 290)

This type of argument, the style of argument of appellees' counsel was precisely that which was outlined as a lawyer's duty by Judge John R. Brown of the Fifth Circuit, in his vigorous dissenting opinion in *Johnson v. Colglazier, supra*, when he said:

"Although there are some formal limitations upon the extent to which counsel in argument may express his personal opinions, his whole presence there, every word, every gesture, every inflection is to persuade the jury to find the critical issues in his client's favor. What he is obviously doing is telling the jury what he, as the advocate, desires them to do."

Appellant further contends that appellees' damage argument violated Canon 15, Canons of Professional Ethics, yet there was no objection to the argument on such grounds, nor was exception taken thereto, nor was there any motion for mistrial on such grounds. At the time of trial there was no complaint in any way, shape or form that counsel for appellees was "testifying," "worming his way into the confidence of the jury," or "injecting unsworn opinion evidence in his argument to the jury."

In the recent criminal case of *State v. Abney, ..... Ariz. ....*, 440 P.2d 914 (1968), the Supreme Court of Arizona affirmed the conviction notwithstanding the prosecutor having told the jury that in his opinion the defendant was guilty. In that case the defendant immediately moved for a mistrial on that ground, but the court noted that the trial judge had instructed the jury "arguments of counsel are not evidence in the case" (just as was done in the case now before this court on at least four separate occasions [R.T. 5, 6, 290, 342]).



The *Abney* case followed earlier Arizona law, *State v. Titus*, 61 Ariz. 493, 152 P.2d 129 (1944), wherein the failure of defendant to object to an expression of opinion by the prosecuting attorney that the defendant was guilty, and the failure to make a request that such remark be expunged from the record, and the failure to request the court to direct the jury to disregard such remark preserved no question for review on appeal.

This is the law in Arizona in 1968, and has been for many years, even in the criminal field where the rights of individuals are so meticulously guarded.

*Union Pacific R. Co. v. Field*, 137 F. 14 (8th Cir.), cited by appellant, is irrelevant to the limited issues before this court.

### CONCLUSION

1. Appellant Petra Williams had a fair trial, settled her case with the insurance carrier for the appellees, and received monetary consideration therefor. Hence, her appeal has been adjudicated and she should be estopped from proceeding further.

2. The damages are not excessive as a matter of law under the yardstick used to measure excessiveness, to-wit:

"In Arizona, the fact-finder's damage award may not be overturned as excessive except where it is '\* \* \* so excessive as to strike mankind, at first blush, as being beyond all measure, unreasonable, and outrageous \* \* \*.' *Fulton v. Johannsen*, 3 Ariz. App. 562, 416 P.2d 983, 988." *United States v. Becker*, 378 F.2d 319 (9th Cir. 1967)

3. The argument of counsel concerning issues now complained of was not objected to, nor was exception taken thereto, nor were curative instructions requested.



4. The jury was properly instructed and arrived at a fair, just and equitable verdict which was sanctioned, approved and ratified by the trial judge.

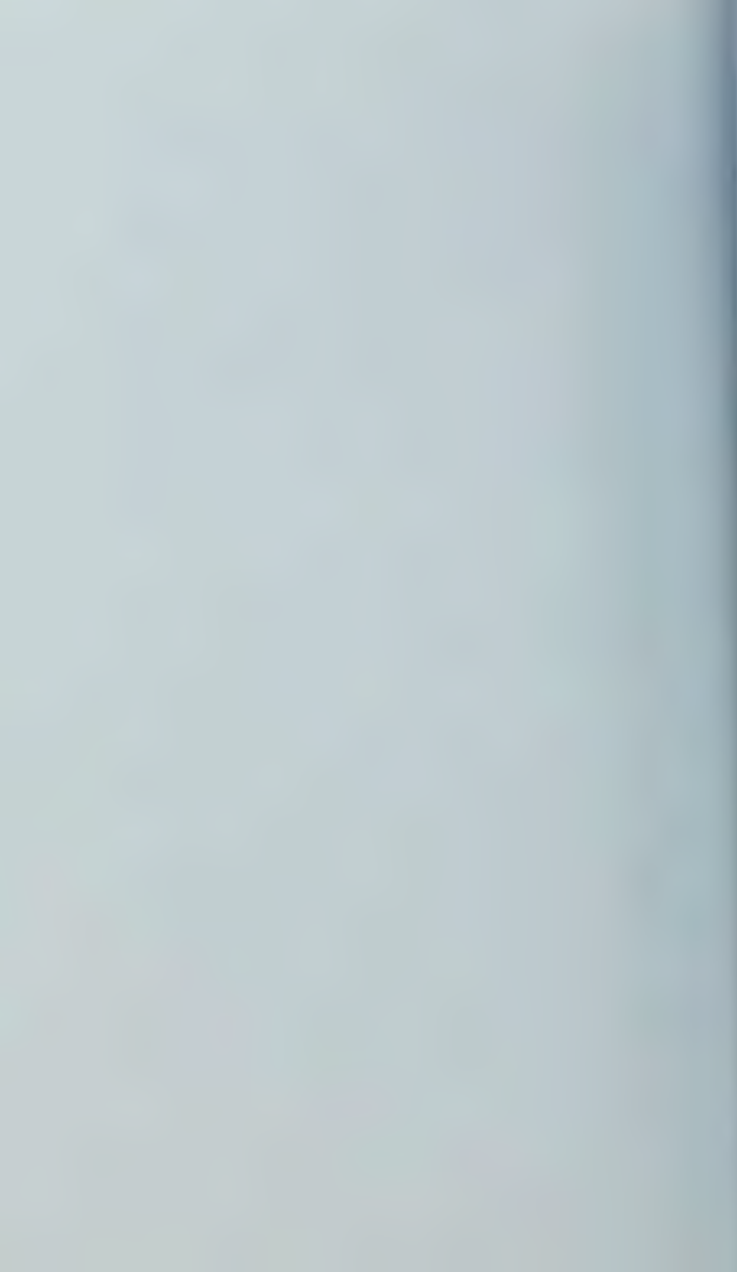
Hence, the judgment should be affirmed.

Respectfully submitted,

KENNETH ROSENGREN  
303 Luhrs Building  
Phoenix, Arizona 85003

*Attorney for Appellees*

**(Appendix A Follows)**







## ***Appendix A***

### **AFFIDAVIT**

STATE OF ARIZONA

County of Maricopa—ss.

KENNETH ROSENGREN, being first duly sworn upon his oath, deposes and says:

That he is the attorney for the Cross-Claimant, Cross-Defendant KULIKOWSKI. That at approximately 5:30 p.m. on November 3, 1967, and while the jury was deliberating, he was in consultation with Roger Perry, Esq. in the offices of Snell & Wilmer, on a matter foreign to the issues of this lawsuit. At said time and place Mr. Perry advised this affiant that he had by telephone exercised an option to settle Mrs. Williams' claim against Mrs. Kulikowski. Your affiant has confirmed the fact of settlement at said time and place with the offices of O'Connor, Cavanagh, Anderson, Westover, Killingsworth & Beshears, as well as the State Farm Insurance Claims Representative for Kulikowski.

The case was settled on exercise of the option and during jury deliberation by Mr. Perry for the sum of \$1,250.

Further affiant saith not.

KENNETH ROSENGREN

Affiant

SUBSCRIBED and SWORN to before  
me this 17th day of November, 1967.

HELEN M. RICH

Notary Public

My Commission Expires 7/29/71



No. 22,635

In the

United States Court of Appeals

*For the Ninth Circuit*

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PETRA WILLIAMS,

*Appellant,*

vs.

FRANK J. KULIKOWSKI and MARIE ANN  
KULIKOWSKI, husband and wife,

*Appellees.*

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Appellant's Reply Brief

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FILED

AUG 13 1968

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MARK WILMER

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*Attorneys for Appellant*

WM. B. LUCK, CLERK





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No. 22635

In the  
**United States Court of Appeals**  
*For the Ninth Circuit*

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PETRA WILLIAMS,

*Appellant,*

vs.

FRANK J. KULIKOWSKI and MARIE ANN  
KULIKOWSKI, husband and wife,

*Appellees.*

---

**Appellant's Reply Brief**

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**PREFATORY ARGUMENT IN REPLY**

This case, in its present posture, might well be referred to as "The Case of the Unsworn Witness." For that is the true issue here. Counsel for appellee overlooks, (or would ignore) the inescapable conclusion that the jury accepted his unsworn opinion as to the verdict value of each claimed item of damage and, in so doing, denied appellant a fair trial. Indeed, the reiteration of his opinion as a "servant of the jury" as to the valuation of each injury claim "bound by the rules of evidence, the ethics of the profession" as to what "is fair as a verdict" could well lead to the conclusion appellant was denied due process of law.

*Re Oliver*, 333 U.S. 257, 68 S.Ct. 499, 92 L.ed. 682 laid down the rule:

“A person’s \* \* \* right to his day in court (are) is basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him \* \* \*”

See also:

*Market St. Ry. Co. v. Railroad Commission*, 324 U.S. 548, 65 S.Ct. 770

“Due process requires that commissions proceed upon matters in evidence and that parties have opportunity for cross examination and rebuttal.”

*State of Wisconsin v. Federal Power Commission*, 201 F.2d 183 (C.A. D.C. 1952)

*Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292, 57 S.Ct. 724, 81 L.ed. 1093

*Public Utilities Commission v. Cole’s Express*, 138 A.2d 466 (Me.)

*L. B. Wilson, Inc. v. Federal Communications Com’n*, 170 F.2d 793 (C.A. D.C.)

*Caesar’s Restaurant v. Industrial Acc. Comm.*, 1 Cal. Rptr. 97, 175 C.A. 850

*Philadelphia Co. v. Securities and Exchange Comm.*, 175 F.2d 804 (vacated on other grounds 327 U.S. 901)

*Pennsylvania State Athletic Comm. v. Bratton*, 112 A.2d 422 (1955)

Former Judge of the New Jersey Chancery Court and Member of Congress Marshall Van Winkle, in his entertaining “Sixty Famous Cases” Vol. I, excerpted the following from “The Ryves Case,” 1866, pages 331, 332:

"Mr. Smith said he felt it his duty to make some observations to the jury before they delivered their verdict.

"The Lord Chief Justice: If you wish to take up any more of their time, you have a right to do so.

"Mr. Smith's Address

"Mr. Smith accordingly addressed the jury, and said he believed on his word and honour as a gentleman that the documents which the petitioner had produced—

"The Lord Chief Justice: I insist on your not finishing that sentence. It is a violation of a fundamental rule of conduct, which every advocate ought to observe, to give the jury your personal opinion."

Counsel may equivocate as much as he wishes, the ugly fact cannot be gainsaid that he stated the amount "I think is appropriate for Mrs. Kulikowski" (R.T. 296) "these are guidelines" (R.T. 297) " \* \* \* as regards the \$91,350.00 verdict, that I think it is fair and equitable" (R.T. 298) " \* \* \* Mr. Perry specifically accused me \* \* \* of chicanery and legerdemain \* \* \* for putting on the board specific sums of money that I think are fair, just, equitable and appropriate." (R.T. 327)

(At this point Mr. Perry interrupted counsel with an objection that this line of argument was not proper rebuttal. "The Court: I think he may proceed." (R.T. 327)

At this point counsel for appellant chided Mr. Perry for not expressing his personal opinion as to what the verdict should be. (Op. Br. 8, 9) advising the jury that, indeed, this was the obligation of counsel in a personal injury case "bound by the rules of evidence, the ethics of the profession, and as an officer, a servant of the jury \* \* \* to give the jury his best estimate, some guidelines, some thought, as to what is appropriate, what is fair as a verdict." (R.T. 327, 328)

And there is no escape from the conclusion that the jury accepted Mr. Rosengren's factual statement; that, indeed, counsel had the right to tell the jury what their verdict should be and that Mr. Perry had defaulted in that respect for the verdict of the jury was Mr. Rosengren's unsworn opinion—to the penny.

### THE RES JUDICATA ARGUMENT

The case of *Di Orio v. City of Scottsdale*, 2 Ariz. App. 329, 408 P.2d 849 is not even remotely in point. It involved judicial action—not a compromise settlement.

### THE ALLOWANCE OF EXCESSIVE DAMAGES

Appellee misstates the evidence as to the condition of Mrs. Kulikowski's injured ankle. Appellee asserts:

"The only way to relieve Mrs. Kulikowski's pain is the impractical solution of keeping her in bed or in a position where she does not have to work. In the event the pain becomes so progressively severe that she is no longer able to work then, and only then does Dr. Nichols plan to do the radical surgical procedure known as the fusion operation." Ans. Br. 7

The transcript reference is to page 188.

Since the point is significant we reproduce here for the convenience of Court and counsel Dr. Nichols' actual testimony, pages 187, 188, 189, 190 (emphasis supplied).

"Q. Doctor, did you experiment with different kinds and classes of shoes that might facilitate her walking or—

A. I am not sure that I would say 'experiment,' but we—

Q. Oh, I am sorry to use a crude term like that. Forgive me.

A. We used—well, we had a problem inasmuch as her ankle joint had limitation of motion. There was a swelling of the joint, which is associated with her injury, and there was pain when Mrs. Kulikowski did ambulate, so that we did use different appliances in an attempt to afford her more support and alleviate her pain, such as arch supports and different type of shoes and things of that nature.

Q. Yes. She complains of constant pain, doctor. Is that consistent with this type of injury?

A. Well, I think it is inasmuch as by examination and x-rays Mrs. Kulikowski has developed a significant arthritic condition of her left ankle.

Q. Have you given some thought or consideration, or is there something you can do to alleviate that?

A. Well, we have done—the first step, of course, is to limit Mrs. Kulikowski's use of her ankle. I mean if she weren't walking or, I mean, *if she didn't have to walk*, which, of course, she does, *she probably wouldn't have significant discomfort*. So along those lines I have recommended and Mrs. Kulikowski intermittently does use a cane when her ankle bothers her.

I have mentioned to Mrs. Kulikowski and have entertained the thought if this particular problem progresses and if this pain of her ankle becomes such that she is no longer able to ambulate because of this discomfort an ankle fusion might well be indicated.

The pain of the joint and, in this case, an ankle, is related to motion of the joint. If we were to stop the motion of this joint, we would greatly diminish the pain.

Q. Yes.

*Now, do I understand correctly, then, that if you were to fuse her ankle, you could eliminate the pain, but she would have a stiff ankle? Would that be without flexion or motion?*

A. She would have no motion of the ankle at all; and, therefore, there would be no pain of the ankle.

However, it's not quite that cut and dried inasmuch as she would have motion of the remaining joints of her foot, *so that she would most likely walk quite well*. By the same token, she would most likely also have some discomfort of the foot because the joints that were then being used would be used more than they normally would because they are taking up the motion of the ankle joint that has been fused.

So I don't think that any fusion procedure is sort of a hundred percent. I mean this is why we think about a fusion rather than doing it routinely because we are not going to return that person to a normal state.

Q. I take it, then, that this condition you have described about her ankle, at least, is a permanent condition?

A. Yes, it is.

Q. Doctor, we have the medical bills in evidence, and there is no need to dwell on those. I did want to ask you, though, if it comes to pass in the future that you do a fusion, can you give us a rough estimate of the cost of such an operation and hospital expenses entailed?

A. Well, the patient, Mrs. Kulikowski, I am sure, would be hospitalized for two or three weeks, and I don't know that I could estimate the cost of hospitalization at that time. Certainly, it would be more than it is now, and now it's probably \$40 a day.

I would think that the surgical fee would be somewhere in the nature of \$350, the anesthetic fee perhaps 60 to 70, I don't know, something of that nature."

The above expert medical testimony—the only testimony on this point in the record, given by plaintiff's own expert, demonstrates:

1. Mrs. Kulikowski now has pain in her ankle only when she walks.



2. The fusion operation would eliminate the pain in the ankle, and she would walk quite well but not normally.

Counsel for appellee in his argument testimony to the jury (R.T. 294) said:

“Now, then, you heard Dr. Nichols testify this morning, and you will recall his testimony as well as I. Essentially he said something like two weeks plus in the hospital, the present cost, roughly \$40 a day, \$350 for the surgeon’s fee, essentially about a thousand dollars. You can figure it up to check on me to see if it isn’t roughly about a thousand. (Writing on board.)”

*And the jury awarded Mrs. Kulikowski the cost of the fusion operation for the verdict equalled exactly the total of the itemization of damages as written by counsel on the board.*

Appellee then misses (or ignores) the thrust of appellant’s argument, for the problem is treated as a simple excessive verdict issue and refuge sought in the familiar rule that a court and jury is best able to value injury, pain and suffering.

*This is not a case of an outrageous verdict—this is a case wherein the jury has awarded a plaintiff the entire cost of a surgical procedure which will substantially eliminate all pain in her ankle and has, at the same time awarded this plaintiff \$50,000 as damages for future pain and suffering as if the surgical procedure was not contemplated and paid for.*

Counsel further testified as to his opinion in his opening argument as follows: (R.T. 296, 297)

“Now, what is it worth to have pain like that? You are going to decide. I am suggesting to you that for the first two years, when she really had it rough, that \$7,500 a year is not inappropriate. You will decide. (Writing on the board.)

"All right. That would be \$15,000. But now this is an old accident, so easy to sweep these past tragedies under the rug and forget about them. It's going on five years. So there has been three other years that we really have to bring this up to date, *and I am suggesting that that pain at the sum of \$2,000 a year.* (Writing on board.)

"Now, that brings us up to date.

*"By the way, we have in evidence a medical evaluation of pain. There is the anesthesiologist's bill in here, I believe it is Dr. Zemer, \$35, to spare one in pain when one is in surgery for that hour or thereabouts. That's an indication. Doesn't he spare you with pain or from pain when they are performing an operation on you?"*

"All of these are merely guidelines. You will decide from your own deliberations.

"And now His Honor will say and direct and give you a mandate that you must consider future pain, future discomfort, and it is your solemn obligation to consider that.

"Now, how long does that go on? Well, you heard the testimony. She is always going to have a state of discomfort, whether she has the ankle fused and loses the mobility of that ankle or not, and his Honor is going to tell you that her life expectation is 25 years; and, therefore, it is your job as people wearing black robes, jurors, judges of the facts, to determine what is fair for future pain and future discomfort.

*"I am suggesting the sum of \$2,000 a year for her life expectation.* (Writing on board.)

"All right. Future pain, \$2,000 a year, 25 years, that's \$50,000." (Emphasis added)

Plainly the \$2,000 per year "guideline" for the jury in appellee's then condition was the same "guideline" employed by counsel for future pain and suffering or the same \$2,000 per year over 25 years' asserted life expectancy.

This is plainly not an excessive verdict—this is a verdict awarding damages for claimed pain and suffering which is to be substantially eliminated by an operation also paid for by appellant.

### **EARNING CAPACITY**

Again appellee misses (or ignores) the thrust of appellant's argument. Mrs. Kulikowski was injured January 19, 1963. She returned to work in September, 1963. She had worked steadily, at the same salary she received prior to the accident to the date of trial November 2, 1967, and she was continuing to receive the salary she had earned and there was no evidence or indication that this would change. Counsel stated to the jury, despite this record, that for the ensuing 12 years, i.e., from her then age of 53 years to age 65 when she would retire that the "guideline" for the jury was the assumption that Mrs. Kulikowski would suffer an earning loss of \$2,000 per year which included the year 1967—when she had not suffered any earning loss and was completely contrary to all the evidence which indicated she would suffer no loss of earnings.

If the precise measure of the loss had not been specified by counsel in his "guidelines" which were plainly overreaching and contrary to the record and if this plainly spurious claim, as made by counsel, had not been blindly accepted by the jury appellant would not have the feeling of outrage at counsel's testimony which spurs this appeal for relief. It accentuates and clearly demonstrates that the jury paid no attention to the court's instruction that the jury was to independently value the evidence and not accept counsel's argument as a "guideline." It nails down the conclusion that by willful disregard of Canon 15, Canons of Professional Ethics, appellee has gained a verdict for damages plainly

not justified by appellee's own evidence. We respectfully suggest that a federal court should not tolerate or condone such conduct or permit the fruits thereof to be enjoyed by the beneficiary thereof.

### THE JURY "GUIDELINES" ISSUE

Appellant tried to make it plain in her Opening Brief that this appeal does not involve the *Botta v. Brunner* controversy. Perhaps, in the hope of directing the attention of the Court away from the sensitive area of a verdict plainly bottomed upon the unsworn opinion testimony of counsel for appellee, appellee would like to lead the Court into resolving this appeal as if that problem was decisive here.

Appellant refuses to be turned aside from the true fundamental error here complained of—a miscarriage of justice brought about by the repeated statement by counsel for appellee as to what amount of damages would be fair, equitable and appropriate in his opinion—and by his bold assertion to the jury that in so doing he was bound by the rules of evidence and his professional ethics. And then, as if this was not enough, by his bold assertion that this was what a lawyer was supposed to do—and by his criticism of counsel for appellant for failing to follow his lead.

Counsel knows, as does the Court, how delicate the balance is as between jury acceptance and rejection of interruptions of counsel in argument—how easily a jury may be swayed by disapproval of interruptions since the jury fails to realize the reason therefor or the purpose thereof. Court and counsel also know that once a statement is made to a jury cautionary instructions are of little value.

Appellant's counsel did object to appellee's argument during the course of the argument and at its conclusion. Appel-

lant, contrary to the assertion of appellee, did move for a mistrial.

"If the court please, at this time the cross-defendants, cross-claimant Williams, moves for a mistrial based upon the misconduct of counsel during final argument.

"I will not attempt to enumerate pending a copy of the transcript all of the many areas wherein counsel went beyond the bounds of propriety in his argument, but I feel that the argument was so filled with error that there is practically no hope of justice being done to my client by this jury."

The Court said:

"Do you care to respond at this time?"

Mr. Rosengren said:

"No."

The Court said:

"Very well. The motion is denied *at this time with leave to renew it later should circumstances warrant and the record justify.*" (R.T. 340) (Emphasis added)

In appellant's Motion for a New Trial counsel stated:

"This Motion for a New Trial is the only means available to Petra Williams to renew the motion for mistrial made at the conclusion of final arguments. We submit that the circumstances warrant the renewal of the motion and that the record justifies its being granted."

In Appellant's Motion for a New Trial (T.R. 29-39; 101-103) each of the grounds for reversal urged here were urged to the trial court. The Reply Memorandum of Appellant (T.R. 103) concludes:

"The motion for a mistrial made at the conclusion of the final argument and renewed at this time pursuant

to the express authority of the court should be granted and a new trial ordered."

The argument that since the trial court gave certain stock cautionary instructions generally to the effect that the jury was the sole judge of the evidence and that counsel's argument was not to be accepted as evidence would weigh more heavily but for two plain facts:

1. The jury patently either did not remember or else disregarded this instruction; or
2. Accepted counsel's statements as a value opinion but not as argument or comment.

Reasonably the jury may have looked upon counsel's opinion as to the appropriate measure of damages as not argument or comment but as an informed opinion entitled to great weight because of counsel's experience as a personal injury lawyer.

And it is not to be overlooked that the Court also told the jury: (R.T. 342)

*"Arguments and comments of counsel are intended to help you in understanding the evidence and applying the law. While arguments are not evidence, counsel may argue reasonable inferences from the evidence. If any comment of counsel has no basis in the evidence as you find it, you are to disregard that comment. If there has been a stipulation or an agreement as to any fact by counsel, you may consider the stipulated fact as evidence."* (Emphasis added)

And also immediately prior to Mr. Rosengren's opening argument: (R.T. 290, 291)

"I would remind you, as I have said earlier, that statements of counsel are not evidence. The facts in this case are as you determine them to be; and regardless of what counsel may inadvertently say, and if you

feel that the facts are different than counsel may represent the facts to be or have been, it's, of course your determination that counts.

"However, I would advise you that arguments of counsel can be most helpful to you in organizing your own thoughts, in recalling the evidence over the last two days, and in helping you evaluate and arrive at a determination of the case.

"So for that reason I urge you, please, pay close attention to the arguments of counsel. They can be very helpful to you."

It seems a reasonable conclusion that the jury may very well have misunderstood the Court's instructions and innocently accepted counsel's *opinion* evidence as being *neither fact nor comment*, particularly because of counsel's assertion that it was part of counsel's obligation, "bound by the laws of evidence and the ethics of the profession" to evaluate the injuries of the plaintiff and give his *opinion* as to the amount the verdict should be as "a servant of the jury."

Be that as it may, either innocently or inadvertently or capriciously, it is clear that the jury accepted counsel's opinion as governing and as a reliable "guideline" which they followed to the penny.

Appellant stated in her Opening Brief and now repeats as putting the position of appellant in clear perspective:

Had appellee called an experienced personal injury lawyer, specializing in plaintiff's cases as a witness and asked such witness, *under oath*, as to his opinion as to the amount of damages which would be "appropriate" as a verdict the offer would be rejected by the Court out of hand.

*Is the error any less egregious because the witness was unsworn?*

The Arizona Supreme Court in *Sisk v. Ball*, 91 Ariz. 239, 371 P.2d 594, 598 said:

“It is well established that any statements by counsel, not based on evidence, which tend to influence the jury in resolving the issues before them solely by an appeal to passion and prejudice are improper and will not be countenanced. \* \* \* *a verdict obtained by incorrect statements or unfair argument or by an appeal to passion or prejudice stands on but little higher ground than one obtained by false testimony.*” (Emphasis added)

### CONCLUSION

Appellant respectfully asserts that she has not had a fair trial and that, accordingly, she “should have another one.”

Respectfully submitted,

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By MARK WILMER

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*Attorneys for Appellant*

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

MARK WILMER  
*Attorney*



No. 22637

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

GEORGE E. DANIELSON, *et al.*,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

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Opening Brief of Appellants, Trustees in Bankruptcy  
of Los Angeles Trust Deed and Mortgage Ex-  
change.

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FILED

GENDEL, RASKOFF, SHAPIRO &  
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JUN 7 1968

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II.

**STATEMENT OF THE CASE.**

Prior to October 8, 1962, a controversy existed between appellants, Trustees in Bankruptcy of Los Angeles Trust Deed and Mortgage Exchange [hereinafter referred to as "Trustees"], and David and Betty Jane Farrell [hereinafter referred to as "Farrells"]. On October 8, 1962, the Trustees applied to the bankruptcy court for authority to compromise their controversy with the Farrells [R. 44]. Said application provided that in consideration of the Trustees' relinquishment of their claims against the Farrells, the Farrells would transfer and assign to the Trustees all of their assets, with the exception of certain specifically enumerated properties. In conjunction with this application, the Farrells filed affidavits purporting to set forth a list of all real and personal property, both tangible and intangible, in which the Farrells had any interest whatsoever [R. 51, 57].

Referee Ronald Walker approved the above described compromise on November 21, 1962 [R. 59]; that order provided on page 5 thereof [R. 63]:

"ORDERED, ADJUDGED AND DECREED that in the event DAVID or BETTY JANE FARRELL had any right, title or interest in or to any property, real or personal, tangible or intangible, as of June 27, 1962, which was not described in the affidavits of DAVID and BETTY JANE FARRELL attached to the Trustees' Application to Compromise and which was not exempt from creditors, then any such property shall be deemed to have been conveyed and transferred to the Trustees in Bankruptcy herein, and DAVID and BETTY JANE FARRELL shall execute or cause to be executed immediately upon demand from the Trustees, such documents as may be required to effectuate

and perfect a transfer and conveyance of such properties to the Trustees in Bankruptcy herein, but this clause shall not in any way be deemed to affect that property which was first acquired subsequent to June 27, 1962; . . .”

The Farrells did not disclose in their affidavits that on July 25, 1961, they had filed a claim for overpayment of income tax for the year 1959, and on July 26, 1961, they had filed a similar claim for overpayment of tax for the year of 1960. Subsequently, on April 29, 1963, the Farrells filed a claim for overpayment of tax for the year 1958 and amended their claim for the refund for the year 1959. The three tax refunds were based upon carryback loss claims for the respective years.

In the Order of November 21, 1962, transferring the Farrells' property to the Trustees, the particular properties reserved to the Farrells were enumerated. Nowhere did the Order, or the Application, or the agreement between the Farrells and the Trustees reserve to the Farrells the carryback loss claims. The property to be retained by the Farrells, in addition to the items specifically set forth, was personal property exempt from creditors under California Code of Civil Procedure section 690. The Trustees, upon discovering that the Farrells were prosecuting claims for refund of taxes, declared their interest in said refunds [Affidavit of James A. A. Smith and Declaration of Interest, R. 37] and have continually asserted their right to said refunds.

On May 14, 1962, David Farrell was convicted of a felony and his sentence included a fine of \$81,500.00 [R. 2-4]. Farrell appealed [R. 5] and on February 10, 1964, the judgment was affirmed [R. 6].

On July 10, 1962, the Trustees acquired title to a property known as the Bloomfield Factory. The Trustees wished to clear this property of liens. At that time there existed, according to government records, an income tax lien against the Bloomfield Factory because of income taxes owed by the Farrells in a sum in excess of \$38,000. In order to clear the property of the tax lien, the Trustees paid to the government, from the funds of Los Angeles Trust Deed and Mortgage Exchange, the sum of \$39,090.02 on July 19, 1962 [R. 41-42].

On June 29, 1967, the Tax Court of the United States, pursuant to a stipulation between the Farrells and the United States [R. 70] entered judgment in favor of the Farrells in the sum of \$73,964.82, plus interest as provided by law [R. 68]. The total sum should, therefore, exceed the sum of \$100,000.00.

On July 28, 1967, the government filed a Notice of Motion to Transfer Monies, claiming that the funds resulting from the tax court judgment in favor of the Farrells [R. 68] should be transferred to the government to satisfy the still unpaid criminal fine imposed upon David Farrell. On October 17, 1967, the government's motion was granted [R. 149], the court order stating, *inter alia*:

"The transfer of assets of David Farrell and Betty Jane Farrell to the trustees of the Los Angeles Trust Deed and Mortgage Exchange did not operate to transfer an inchoate right to refund of taxes (31 U.S.C. § 203) . . ."

Appellant Trustees' motion for reconsideration [R. 151] was denied on December 14, 1967 [R. 166].



### III.

#### ISSUES PRESENTED.

1. Were the Farrell carryback loss claims capable of being transferred by the Order of November 21, 1962, compromising a controversy between the Farrells and the Trustees?

2. If the carryback loss claims were capable of being transferred, was such transfer nevertheless voided because of non-compliance with the provisions of the anti-assignment of claims statute, 31 U.S.C. §203?

### IV.

#### ARGUMENT.

##### A. A Carryback Loss Claim Is "Property" That Can Be Assigned.

The question whether a carryback loss claim is "property" or an interest in property, was considered in the recent case of *Segal v. Rochelle*, 382 U.S. 375, 15 L. Ed. 2d 428, 86 S. Ct. 511 (1966), where the Supreme Court held that a carryback loss claim became the property of a trustee in bankruptcy under the provisions of section 70(a)(5) of the Bankruptcy Act, 11 U.S.C. §110(a)(5), and that a carryback loss claim was an interest or property that could have been assigned by the bankrupt prior to the date of his bankruptcy. (382 U.S. at 378-382, 86 S. Ct. at 514-517).

That a carryback loss claim is "property" is also clear from *In re Donley*, 242 F. Supp. 403, 406-407 (E.D. Mo. 1965), and by implication from *In re Goodson*, 208 F. Supp. 873 (S.D. Cal. 1962), where a claim for wage withholdings for income tax purposes was held to be assignable "property."

The validity of an assignment, excluding controlling federal questions, is determined pursuant to the law of the state in which the assignment was made. See *Danning v. Mintz*, 367 F. 2d 304 (9th Cir. 1966) cert. denied, 386 U.S. 990, 18 L. Ed. 2d 335, 87 S. Ct. 1305 (1966). Accordingly, an examination must be made of California law.

The public policy of California favors the modern view of permitting the free transferability of all types of property. See, *Farmland Irrigation Co. v. Dopplmaier*, 48 Cal. 2d 208, 308 P. 2d 732 (1957). Although the California courts have not dealt with the particular problem of a carryback loss claim, the existing California decisions on analogous situations compel the conclusion that such claims would be held to be assignable property. Analogous California cases holding particular inchoate rights to be assignable property include: *Farmland Irrigation Co. v. Dopplmaier*, *supra*, [assignment of patent licenses]; *Fricker v. Utto & Tormina Co.*, 48 Cal. 2d 696, 312 P. 2d 1085 (1957) [assignment of interest in monies to be paid for crops not yet planted]; *Dougherty v. California Kettleman Oil Royalties, Inc.*, 9 Cal. 2d 58, 69 P. 2d 155 (1939) [assignment of percentage of oil to be produced]; *Bridge v. Kedon*, 163 Cal. 493, 126 Pac. 149 (1912) [assignment of money to be earned under existing contract]; *H.S. Mann Corp. v. Moody*, 144 Cal. App. 2d 310, 301 P. 2d 28 (1956) [assignment of future accounts receivable]; *First National Bank v. Pomona Tile Mfg. Co.*, 82 Cal. App. 2d 592, 186 P. 2d 693 (1947) [assignment of money to be earned under existing contract]; *Henshaw v. Henshaw*, 68 Cal. App. 2d 627, 157 P. 2d 390 (1945) [assignment of interest in trust

funds subject to defeasance if beneficiary did not survive his mother]; *H.D. Roosen Co. v. Pacific Radio Pub. Co.*, 123 Cal. App. 545, 11 P. 2d 873 (1932) [assignment of inchoate contract rights]; and *Cox v. Hughes*, 10 Cal. App. 553, 102 Pac. 956 (1909) [assignment of wages]. See also *Estate of Zuber*, 146 Cal. App. 2d 584, 596, 304 P. 2d 247 (1956), restating the California public policy favoring free assignability of contingent interests.

In light of the foregoing, it is clear that a carryback loss claim is "property" or an interest in property that can be assigned and that an assignment of such an interest does not violate any policy of the State of California and would be enforceable there. Therefore, the Court Order of November 21, 1968 [R. 59], approving and authorizing the compromise between the Farrells and the Trustees, transferred the carryback loss claims to the Trustees.

## **B. The Assignment of the Carryback Loss Claim to the Trustees Did Not Violate the Provisions of 31 U.S.C. §203.**

### **1. The Assignment Was Involuntary, Taking Effect by Operation of Law.**

A carryback loss claim is an interest or property capable of being transferred. The Farrell carryback loss claims were transferred to the Trustees by way of an application for authority to compromise a controversy [R. 44] and a court order granting such authority and approving the compromise [R. 59]. Therefore, the Trustees are the valid holders and owners of the carryback loss claims unless the transfer violated the pro-

visions of 31 U.S.C. §203, the anti-assignment of claims statute. That statute provides in pertinent part:

“All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, . . . except as hereinafter provided, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. . . .”

In substance, this statute provides that there cannot be a voluntary assignment of a claim against the government without compliance with the statute. It is clear that the statute does not void all assignments of claims against the government. For example, in *Erwin v. United States*, 97 U.S. 392, 397, 24 L. Ed. 1065 (1878), it was held that the statute did not embrace cases where there was a transfer by operation of law and specifically that it did not bar a bankrupt's assignment of a demand against the government to an assignee in bankruptcy. Similarly, in *Goodman v. Ni-black*, 102 U.S. 556, 560, 26 L. Ed. 229 (1881), it was held that the statute did not apply to an assignment for the benefit of creditors.

A further exception to the ban of 31 U.S.C. §203 are assignments effectuated by court order. It is well established that such assignments are not voluntary assignments within the purview of the anti-assignment statute. In *New Rawson Corp. v. United States*, 55 F. 2d 291 (D. Mass. 1943), a state court receiver trans-

ferred property subject to court order and the court thereafter approved the sale of property. In a later suit against the government by the assignee of the property, the court held the assignee to be the real party in interest and further held that 31 U.S.C. §203 did not render the transfer void, the court stating at page 293:

“Section 203 does not apply to a transfer of a claim through a judicial sale under order of the court as is the case here. Such a transfer is not a voluntary assignment such as the statute makes void; it is an assignment by operation of law and not in violation of the section.”

The principle that a transfer of title by operation of law does not violate the provisions of the anti-assignment statute was also proclaimed in *Western Pacific R. Co. v. United States*, 268 U.S. 271, 275, 69 L. Ed. 951, 45 S. Ct. 503, 505 (1924); *Price v. Forrest*, 173 U.S. 410, 421, 41 L. Ed. 749, 19 S. Ct. 434, 439 (1899); and in *Davis Sewing Machine Co. of Delaware v. United States*, 60 Ct.Cl. 201, 221 (1925) aff'd 273 U.S. 324, 71 L. Ed. 662, 47 S. Ct. 352 (1927).

In *Price v. Forrest*, *supra*, a creditor of the assignor reduced his claim to a judgment in a state court and had that court, which had jurisdiction of the parties, appoint a receiver for the assignor's claim against the government. The state court further ordered the assignor to assign his claim against the government to the receiver, who would hold it, subject to order of the court, for the benefit of those entitled thereto. As noted above, the Supreme Court held that such assignment was not voided by the provisions of the anti-assignment statute.

Appellant Trustees respectfully contend that the assignment of the carryback loss claims by the Farrells to the Trustees, made pursuant to application to compromise [R. 44] and court order [R. 59] was an involuntary assignment by operation of law and therefore outside of the scope of 31 U.S.C. §203. The assignment in issue here was the culmination of a settlement of a controversy existing between the Trustees, the Farrells and others. Prior to the Trustees' application for compromise, the Trustees had filed counterclaims to certain claims of David Farrell in a case then pending in the United States District Court, for the Southern District of California, Central Division, entitled "In the Matter of LOS ANGELES TRUST DEED & MORTGAGE EXCHANGE, a California corporation, and dba TRUST DEED & MORTGAGE MARKETS, a California corporation, Bankrupt," In Bankruptcy No. 118, 178-MC. Subsequently, the Trustees instituted an action against the Farrells by way of an application for a turnover order. Objections to jurisdiction were interposed and a hearing on said objections was continued to permit the Trustees to consolidate all of their counterclaims against the Farrells into one pleading. At this point, on October 8, 1962, the Trustees filed their application for authority to compromise controversy, which application eventually resulted in the court order approving the assignment in issue.

The authority of a trustee in bankruptcy to compromise a controversy comes from Section 27 of the Bankruptcy Act, 11 U.S.C. §50, which provides that any compromise must be "with the approval of the court." See also General Order 33. A compromise entered into without the authority or ratification of the bankruptcy

court is not binding on the parties thereto. See *Lincoln National Life Ins. Co. v. Scales*, 62 F. 2d 582 (5th Cir. 1933). Although the court to whom a petition for authority to compromise is addressed should consider the wishes of creditors, it has the last word with respect to the compromise. *Matter of National Public Service Corp.*, 68 F. 2d 859 (2nd Cir. 1934) cert. denied, 292 U.S. 641, 78 L. Ed. 1492, 54 S. Ct. 773 (1933). See generally, 2 Collier, Bankruptcy Par. 27.04 (14th Ed.), pp. 1093ff. Cf. *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, ..... U.S. ...., ..... L. Ed. 2d ....., 88 S. Ct. 1157, 1163-1169 (1968), discussing the role of the bankruptcy court with respect to a compromise in a chapter X reorganization.

Since the assignment in issue came about as a result of a compromise of a controversy between the Farrells and the Trustees, and since the compromise, and the assignment given as consideration therefor by the Farrells, would be of no force and effect unless authorized by an order of the bankruptcy court, it is therefore clear that the assignment of the carryback loss claims was an assignment by operation of law, and outside of the scope of 31 U.S.C. §203. Just as was the case in *Price v. Forrest*, *supra*, where an assignment to a state court receiver under order of the state court was held to be a valid assignment, so in this case, an assignment to a trustee in bankruptcy pursuant to an order of the bankruptcy court should also be held valid. To hold that an assignment made pursuant to a compromise agreement, entered into after the parties had begun litigation and effective only upon court order, is a voluntary assignment would be to stretch the meaning of "voluntary" beyond recognition.



2. Assuming *Arguendo* That the Assignment of the Farrell Carryback Loss Claims to the Trustees Is Found to Have Been Voluntary, Said Assignment Is Analogous to an Assignment for the Benefit of Creditors, and Thus Outside the Scope of 31 U.S.C. §203.

As recognized by the Supreme Court in *United States v. Shannon*, 342 U.S. 288, 292, 96 L. Ed. 321, 72 S. Ct. 281, 284 (1952), there are two types of voluntary assignments which are excluded from the sweep of the anti-assignment statute—transfers by will and general assignments for the benefit of creditors. The justification for the latter exclusion is that such an assignment is analogous to an assignment in bankruptcy. See *Goodman v. Niblack*, 102 U.S. 556, 560-561, 26 L. Ed. 229 (1881).

In California an assignment for the benefit of creditors may be made in either of two ways—according to the statutory scheme contained in California Civil Code §§3449-3473 or pursuant to a common law assignment which is expressly recognized in California Civil Code §3448. See *Bumb v. Bennett*, 51 Cal. 2d 294, 298, 333 P. 2d 23 (1958), and *Brainard v. Fitzgerald*, 3 Cal. 2d 157, 163, 44 P. 2d 336 (1935). A common law assignment for the benefit of creditors was upheld in *Jarvis v. Webber*, 196 Cal. 86, 236 Pac. 138 (1925), where the court noted that such an assignment was similar to a statutory assignment for the benefit of creditors, and valid if made for the benefit of creditors generally.

Appellant Trustees respectfully submit that assuming *arguendo* the assignment in issue was voluntary, it was



in the nature of a general common law assignment for the benefit of creditors. See *Jarvis v. Webber*, 196 Cal. 86, 95, 236 Pac. 138 (1925), where it was said:

“If the conveyance is to a trustee, and the debtor intends to divest himself, not only of the title to the property, but of all control over it; if it is intended as an absolute conveyance of all of his property, and is made for the purpose of securing a distribution of its proceeds among his creditors, or a portion of them, in legal effect it is an assignment for the benefit of creditors, no matter what name or designation the parties may have given it.”

In the instant case the conveyance was to a trustee, the debtor intended the conveyance to be absolute and relinquished all title to and control over the assigned property and the assignment was made for the purpose of securing a distribution of the debtor's assets among a portion of his creditors. Since a voluntary assignment for the benefit of creditors is outside the scope of 31 U.S.C. §203, the anti-assignment statute, *Goodman v. Niblack*, *supra*, and since the assignment in issue is in the nature of a general common law assignment for the benefit of creditors, appellant Trustees respectfully submit that the assignment of the carryback loss claims is outside the scope of the anti-assignment statute.

V.

CONCLUSION.

A carryback loss claim is an interest or property that can be assigned, and an assignment of such an interest is not against the public policy of the State of California. The Farrell carryback loss claims were assigned to the Trustee by an order of the bankruptcy court authorizing and approving a compromise of a controversy between the Farrells and the Trustees. An assignment made pursuant to a court order is an involuntary assignment by operation of law and thus outside of the scope of the anti-assignment of claims statute, 31 U.S.C. §203. The Trustees are therefore the valid owners and holders of the Farrell carryback loss claims.

Furthermore, if the transfer pursuant to court order is deemed a voluntary transfer, nevertheless the assignment of the Farrell assets qualifies as a general common law assignment for the benefit of creditors and is exempt from the provisions of the anti-assignment of claims statute, 31 U.S.C. §203.

Wherefore, appellants, Trustees in Bankruptcy of the Los Angeles Trust Deed & Mortgage Exchange respectfully request that the Order of the United States District Court for the Central District of California granting respondent's motion for order transferring monies be reversed.

GENDEL, RASKOFF, SHAPIRO &  
QUITTNER,

By RICHARD S. BERGER,

*Attorneys for Appellants Trustees in Bankruptcy of Los Angeles Trust Deed and Mortgage Exchange.*

### **Certificate.**

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

RICHARD S. BERGER







N O. 2 2 6 3 7  
IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

GEORGE E. DANIELSON, et al.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

BRIEF FOR APPELLEE

---

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

---

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IN THE UNITED STATES COURT OF APPEALS  
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BRIEF FOR APPELLEE

---

I

STATEMENT OF THE CASE

The statement prepared by the Trustees appears accurate except that the fine imposed upon David Farrell on May 14, 1962 was \$86,500.00 rather than the \$81,500.00 inadvertently stated [R. 2-4]. <sup>1/</sup> In addition, the Internal Revenue Service transferred to the Registry of the Court on April 8, 1968, \$94,127.53 which according to their calculations is the total tax refund including interest due the Farrells. Their computation also indicates that \$73,174.89 of this figure is attributable to the 1962 operating loss which was not available until January 1, 1963, with

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<sup>1/</sup> "R." refers to Reporter's Transcript.



the remaining \$20,952.64 attributed to operating losses from years prior to 1962.

## II

### ARGUMENT

- A. THE FARRELLS' CARRYBACK LOSS CLAIMS WERE NOT CAPABLE OF BEING TRANSFERRED BY THE ORDER OF NOVEMBER 21, 1962 BECAUSE OF RESTRICTIONS IN THE ORDER.
- 

Referee Walker's Order of November 21, 1962, specifically excludes from the transfer "property which is exempt from creditors under the laws of the State of California" [R. 62]. The Trustees' Application for the Order contains similar language [R. 47]. The California Code of Civil Procedure Section 688 specifically provides that causes of action are exempt from creditor levy. Thus it is clear by the express terms of the Application and Order that the Farrells' carryback loss claims were not to be included in the property to be transferred to the Trustees.

It is true that the Farrells' accompanying affidavit executed on June 27, 1962 and attached as an exhibit to the Application, states that the property to be turned over to the Trustees excludes "only property which is exempt under any of the subdivision (sic) of the California Code of Civil Procedure #690." [R. 51-52]. However, this limitation on the term "exempt" was not followed in the subsequent Order.





It is also noted that California Code of Civil Procedure Section 688.1 makes it possible for a judgment creditor to place a lien on a cause of action. However, there is no indication that the parties intended to limit the term "exempt" to those items permanently and completely exempt from creditor levy.

A number of exempt items such as wages, motor vehicles, and life insurance proceeds are only conditionally or partially exempt according to California exemption statutes.

In any event, both the Application and Order were drafted by counsel for the Trustees. In case of uncertainty, a contract is construed most strongly against the party who drafted the instrument and caused the uncertainty to exist. Riess v. Murchison (C.A. 9th 1964), 329 F.2d 635, Burr & Ladd, Inc. v. Marlett (1964), 41 Cal. Rptr. 130, 230 Cal. App. 2d 468.

Therefore, any possible uncertainty as to what was meant by "exempt property" should be construed against the Trustees.

The Order of November 21, 1962 states that property acquired by the Farrells after June 27, 1962 is not includable in the transfer [R. 63]. The Application filed on October 8, 1962 also states that after-acquired property shall be free of any claims by the Trustees [R. 47].

The decision of the Tax Court of the United States in granting refunds to the Farrells was not entered until June 29, 1967 [R. 70-72]. On June 27, 1962, the Farrells' right to this refund had not yet come into existence. Indeed that portion of the refund



claim based on losses from the 1962 tax year could not have even been claimed prior to January 1, 1963. The Internal Revenue Code of 1954 provides that an operating loss carryback does not arise until the last day of the taxable year of the taxpayer 26 U.S.C. 172(c). "No claim, but only a prospect or expectation of a claim, to a net loss carryback refund can arise until the end of the taxable year . . . " Fournier v. Rosenblum (C.A. 1st 1963), 318 F.2d 525, 527. Also see In re Sussman (C.A. 3d 1961), 289 F.2d 76.

Since the Farrells had no property rights in tax refunds existing on June 27, 1962, the refund acquired five years later is clearly after-acquired property not includable in the transfer by the language of the Order.

B. ANY PURPORTED ASSIGNMENT OF THE  
CARRYBACK LOSS CLAIM TO THE  
TRUSTEES WOULD BE A VIOLATION OF  
31 U.S.C. 203.

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1. Any Purported Assignment Would Be  
Clearly Voluntary.

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The Courts have found several purposes for the Anti-Assignment Statute originally enacted as R. S. 3477 in 1853. Among these are to save to the United States "defenses which it has to claims by an assignor by way of set-off, counter claim, etc., which might not be applicable to an assignee". Grace v. United States (D.C. Maryland 1948), 76 F.Supp. 174, 175.



For almost a century, several well-recognized exceptions have been read into the Act. These include transfers resulting by operation of law. United States v. Gillis (1877), 95 U.S. 407.

The rationale for this exception is stated to be the unfairness which would result if a just claim against the United States passed by operation of law, and if the assignee were prevented by the Act from suing on it, and the assignor could not sue since he was no longer the owner. Kinney-Lindstrom, Inc. v. United States (N. D. Iowa 1960), 186 F. Supp. 133, 138.

However, the Courts have consistently applied the Act with vigor where the assignment is voluntary in character. United States v. Shannon (1952), 342 U.S. 288.

In cases where the Courts have determined that transfers legalized by Court order are the equivalent of transfers by operation of law, there is no indication of any otherwise voluntary assignment. For example, in New Rawson Corp. v. United States (Mass. 1943), 55 F. Supp. 291, the conveyance was made pursuant to a state receivership in which there is no indication of any voluntary transfer by the original owner.

In the one case thus far reported, involving an essentially voluntary assignment with title subsequently passing by Court order, the purported assignment was struck down with the Court noting that "while the legal title to the claim passed by Court authority it did not pass by operation of law." Kinney-Lindstrom, Inc. v. United States, 186 F. Supp. 138-139, supra.

In this case, an executrix voluntarily assigned a tax refund



claim with the assignment then receiving the necessary court approval. It was held that the legal title was not taken involuntarily from the executrix and thus was a voluntary assignment on her part interdicted by the Anti-Assignment statute.

Any purported assignment of the tax refund claim by the Farrells to the Trustees would be equally voluntary in character and would not be saved from the provisions of the Anti-Assignment statute by a subsequent Order.

2. Any Purported Assignment Would Be Clearly Defective As A General Assignment For The Benefit Of Creditors.

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As defined by the Courts, a general assignment is a transfer of all or substantially all of the debtor's property to another person in trust to collect any money owing to the debtor, sell and convey the property, distribute the proceeds to his creditors and return the surplus, if any, to the debtor. In re McCrum (C. A. 2d 1914), 214 Fed. 207. Missouri-American Electric Co. v. Hamilton Brown Co. (C. A. 8th 1908), 165 Fed. 283.

It is an act of bankruptcy, 11 U. S. C. 21a(4). The assignment must be for all or nearly all of the debtor's property although minor exceptions will be disregarded. In re Dashiell (C. A. 6th 1917), 246 Fed. 366. Real estate may not be reserved Missouri-American Electric Co. v. Hamilton Brown Co. ,





186 F. Supp. 283, 288, supra.

Such a common law or nonstatutory form of assignment is valid in California only if of the entire assets of the debtor and for the benefits of creditors generally. Jarvis v. Webber (1925) 196 Cal. 86, 236 Pac. 138. Brainard v. Fitzgerald (1935), 3 Cal. 2d 157, 44 P. 2d 336.

The Courts recognize the exception of a general assignment from the provisions of the Anti-Assignment Statute only if it includes all of the debtor's assets and is for the benefit of all his creditors. Goodman v. Niblack (1881), 102 U. S. 556. Butler v. Goreley (1892), 146 U. S. 303.

As the Supreme Court stated in Goodman v. Niblack, 102 U. S. 556, 560, supra, "In what respect does the voluntary assignment by an insolvent debtor of all his effects for the benefit of all his creditors, which effects must, if the assignment is honest, include a claim against the government, differ from the assignment which is made in bankruptcy?"

The purported assignment before us is clearly not a general assignment excepted from the provisions of the Anti-Assignment Statute. The Trustees represent only creditors filing claims against a bankrupt entity known as the Los Angeles Trust Deed and Mortgage Exchange as distinguished from the creditors of the Farrells.

The terms of the Application and Order specifically reserve substantial amounts of both real and personal property to the Farrells. The Application states that the value of nonexempt



property thus reserved is estimated at \$15,000.00 [R. 49].

Thus, the purported Assignment is fatally defective as a General Assignment on at least two grounds and is thus not removed from the restrictions of the Anti-Assignment Statute.

### CONCLUSION

The order of the District Court is correct and should be affirmed.

Respectfully submitted,

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No. 22637

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

GEORGE E. DANIELSON, *et al.*,

*Appellants,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

Reply Brief of Appellants, Trustees in Bankruptcy of  
the Los Angeles Trust Deed and Mortgage  
Exchange.

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## Reply Brief of Appellants, Trustees in Bankruptcy of the Los Angeles Trust Deed and Mortgage Exchange.

---

The Government now apparently concedes that the carryback loss claim was property, but seeks to defeat the Trustees' rights to the property by asserting that it was excluded from the property transferred to the Trustees, or that, if included, it violated the anti-assignment statute. Neither defense is supported by the facts in this case, nor by statutory or case authority.

### I.

**The Farrell Carryback Loss Claims Were Not Excluded From the Assets Vested in the Trustees in Bankruptcy; the Order Regarding the Compromise of Controversy Is Not Ambiguous.**

The Trustees' Application to Compromise and the annexed Farrell Affidavits included all possible categories of property and excluded only specifically de-

lineated properties and the specific category of "property which is exempt under any of the subdivisions of California Code of Civil Procedure §690." The Affidavit of the Farrells was the corner stone upon which the Application was founded, and the Order approving the compromise does not in any manner whatsoever reflect an intent by the court to modify the agreement of compromise. The Order approving compromise provided that "The application be and it hereby is granted." The balance of the language in the Order provided specific authority for consummation of the compromise of the controversy. As between the Farrells and the Trustees in Bankruptcy, the Farrell Affidavits unequivocally state that the excluded properties are limited to property exempt under the subdivisions of California Code of Civil Procedure §690 and to the specifically listed individual assets. The Farrells could not successfully contend as against the Trustees that the carryback loss was an excluded item; the Government has no special power or higher right which would permit it to so contend.

The Government's contention is based upon a strained construction of the Order approving compromise of controversy and would require this court to ignore the Application to Compromise and the annexed Farrell Affidavits, but California and federal courts have long held that several instruments relating to the same subject matter and executed as part of substantially one transaction must be construed together as one instrument. *Burnett v. Piercy*, 149 Cal. 178, 189, 86 Pac. 603 (1906); *Harm v. Frasher*, 181 Cal. App. 2d 405, 413, 5 Cal. Rptr. 367 (1960); *Basile v. California Packing Corp.*, 25 F. 2d 576, 577 (9th Cir. 1928); California Civil Code §1642.

Further, the Government would require that the reference to California Code of Civil Procedure §690 in the Affidavit be deemed meaningless or inoperative. That, however, is contrary to the accepted rules of construction as set forth, for example, in *Hol-Gar Mfg. Corp. v. United States*, 351 F. 2d 972, 979 (Ct. Cl. 1965) where the court stated:

“In construing . . . [the terms of an instrument] the intention of the parties must be gathered from the whole instrument. . . . Also, an interpretation which gives a reasonable meaning to all parts of an instrument will be preferred to one which leaves a portion of it useless, inexplicable, inoperative, void, insignificant, meaningless, or superfluous; nor should any provision be construed as being in conflict with another unless no other reasonable interpretation is possible.” (Emphasis added).

It is only when the interpretation urged by the Government is adopted that a contradiction or uncertainty appears. It is elementary that an interpretation of an instrument which leads to contradiction should not be favored. Provisions should be interpreted as coordinate and not contradictory. *Union Management Corp. v. United States, supra*, at 806.

The Government contends that whenever an instrument is ambiguous, it must be construed most strongly against the party who drafted it. This rule is to be utilized only where the true intent of the parties cannot be determined either from the instrument itself or from extrinsic evidence. See *Silva v. Meyer*, 129 Cal. App. 2d 15, 18-19, 276 P. 2d 174 (1954). Here, the application of this rule is unnecessary since any alleged ambiguity in the instruments is cured by reading the

ceding year. The corporation is, in effect, allowed to take a tentative credit against its unpaid tax for the preceding year in the amount of the carryback refund which it expects to be entitled to at the end of the current year.

Thus, an operating loss carryback claim is transferable property prior to the end of the taxable year; the Farrell carryback loss claims existed before June 27, 1962, and the Order of November 21, 1962 effectively transferred the Farrell carryback loss claims to the Trustees.

### III.

#### The Farrell Carryback Loss Claims Were Transferred by Operation of Law.

A transfer effectuated by order of the bankruptcy court is a transfer by operation of law and outside the scope of the Anti-assignment statute, 31 U.S.C. §203, regardless whether the assignor would have voluntarily made the transfer. In *In re Pottasch Bros. Co.*, 11 F. Supp. 272 (S.D.N.Y. 1935) aff'd 79 F. 2d 613 (2nd Cir. 1935), a creditor of a bankrupt filed a proof of claim as a partly secured claim. The trustee, desiring to compromise the claim, agreed to transfer to the creditor all outstanding receivables and claims of the bankrupt. Among these claims was a claim against the United States for excess duties paid, the existence of which was unknown to the trustee. The bankruptcy court ordered that the transfer and compromise be approved. Thereafter, the claims against the United States were approved and the creditor brought this action to obtain the money received by the trustee from

the United States. In allowing the claim, the District Court stated:

“The trustee suggests that a transfer of the claims against the United States pursuant to order of the court would be void. *A transfer by a trustee in bankruptcy of a bankrupt’s claim against the United States, pursuant to order of the bankruptcy court, is regarded as a transfer by operation of law and not in violation of the act forbidding assignments of such claims.* Such a transfer had no tendency to promote traffic in claims against the United States, and is not within the spirit of the statute.” (11 F. Supp. at 277) (Emphasis added).

See also *Western Pacific R. Co. v. United States*, 268 U.S. 271 (1925) and *In re Gerstenzang*, 5 F. Supp. 904 (S.D.N.Y. 1933), where it was held that the provisions of 31 U.S.C. §203 did not affect voluntary sales of a bankrupt’s property by its trustee, since such sales were approved by court order and were thus transfers by operation of law.

The Government’s reliance on *Kinney-Lindstrom Foundation, Inc. v. United States*, 186 F. Supp. 133 (N.D. Iowa 1960), is misguided. That case involved an order of a state probate court rather than a federal bankruptcy court. In *Kinney-Lindstrom* the assignment was from the estate to the residuary beneficiary of the estate, and the application for the order authorizing the assignment expressly stated that the beneficiary would eventually receive the claim without the assignment. Here, however, there was no relationship between the Farrells and the Trustees apart from the fact that the Trustees had brought an action against the Farrells. The assignment by the

Farrells was made under duress; that is, if there were no assignment, the Trustees would proceed with their action. It is thus clear that the facts of *Kinney-Lindstrom* are not at all parallel to the facts of the instant case.

Furthermore, it is respectfully submitted that the decision in *Kinney-Lindstrom* is incorrect. The court there held, without citation of authority, that a transfer by an executrix, pursuant to court order was a voluntary transfer. Such a holding cannot be justified. If a transfer is not effective without a court order approving it, it cannot be said to be voluntary, for to so hold would stretch the meaning of "voluntary" beyond recognition.

#### IV.

#### **The Government Is Estopped to Deny the Trustees' Right to the Farrell Carryback Loss Claims.**

The Government, besides being a judgment creditor of David Farrell, had filed a claim in the Los Angeles Trust Deed and Mortgage Exchange bankruptcy proceedings. As a creditor, the Government received notice of the Trustees' Application for authority to compromise their controversy with the Farrells. The Government, knowing that the Farrells had filed claims for tax refunds based upon operating loss carrybacks, and knowing that the language of the proposed compromise would transfer the Farrell carryback loss claims to the Trustees, nevertheless made no objection to the Application, did not appear at the hearing on the Application and for a period of approximately five years, acquiesced in the provisions of the Order compromising the controversy.

The proper time for the Government to voice its objections was at the hearing on the Trustees' Application; the Government is now estopped to deny the Trustees' right to the refund resulting from the Farrell carryback loss claim.

### Conclusion.

A carryback loss claim is a transferrable property right that exists prior to the end of the taxable year in which it arises. The Farrell carryback loss claims were not specifically reserved to the Farrells, nor were they included in the exempt property claimed by the Farrells. A transfer pursuant to order of the bankrupt court is outside of the language and intent of the Anti-assignment of claims statute. The Farrell carryback loss claims therefore vested in the Trustees by the express terms of the Order of November 21, 1962, compromising a controversy between the Farrells and the Trustees.

Wherefore, appellants, Trustees in Bankruptcy of Los Angeles Trust Deed and Mortgage Exchange respectfully request that the Order of the United States District Court for the Central District of California granting appellee's Motion for Order transferring monies be reversed.

GENDEL, RASKOFF, SHAPIRO &  
QUITTNER,

By ARNOLD M. QUITTNER,  
*Attorneys for Appellants Trustees in  
Bankruptcy of Los Angeles Trust  
Deed and Mortgage Exchange.*





No. 22638 ✓

In the  
United States Court of Appeals  
*For the Ninth Circuit*

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REX SCHEPP, et ux.,

*Appellants,*

vs.

ELLEN LANGMADE, et al.,

*Appellees.*

On Appeal from the United States District Court  
for the District of Arizona

**Brief for Appellants**

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No. 22638

In the

# United States Court of Appeals

*For the Ninth Circuit*

---

REX SCHEPP, et ux.,

*Appellants,*

vs.

ELLEN LANGMADE, et al.,

*Appellees.*

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On Appeal from the United States District Court  
for the District of Arizona

## Brief for Appellants

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### **JURISDICTIONAL STATEMENT**

Trial was had on the above entitled cause in the United States District Court for the District of Arizona on May 16, 1967, to the Court sitting without a Jury. On September 21, 1967, the Court entered Judgment in favor of the Plaintiff-Appellees. (TR 10-11) The Defendant-Appellants made timely motions for new Trial and/or to alter and amend Judgment. (TR 155) Defendant-Appellant's said Motions were denied on November 6, 1967 by the Court. On December 4, 1967, Defendant-Appellant filed their timely Notice of Appeal and supersedeas bond on Appeal. On December

29, 1967, Defendant-Appellants filed a second Motion for New Trial under Rule 60, alleging that the Defendants had been deprived of their right to a Trial by Jury. Said second Motion for New Trial under Rule 60 was denied on January 15, 1968, by the Court.

This matter was before the United States District Court for the District of Arizona pursuant to Title 28 USC Section 1332 and is presently before this Court pursuant to Title 28 USC, Section 1291.

### **STATEMENT OF THE CASE**

Stephen W. Langmade, Plaintiff-Appellee's intestate, was an attorney and rendered legal services to Evansville Television, Inc. and it was agreed that the reasonable value of Langmade's services was \$37,000.00 (TR 33). Langmade agreed with Evansville Television, Inc. to accept 1,000 shares of Class A stock and 1,000 shares of Class B stock of Evansville Television, Inc. which it was agreed was worth \$20.00 per share or a total of \$40,000.00 (TR 33). Langmade paid \$3,000 to Evansville Television, Inc. in order to make up the difference between the agreed value of his services and the agreed value of the stock and received 1,000 shares of Class A and 1,000 shares of Class B common stock of Evansville Television, Inc. (TR 33). Subsequently, the Defendant-Appellant Schepp and Langmade entered into a written agreement that Langmade was entitled to 2,000 shares of Class B stock which Langmade was to receive from Evansville Television, Inc. after return of the stock certificates for the 1,000 shares of Class A and 1,000 shares of Class B stock, which Langmade subsequently sent to Appellant Schepp in Schepp's capacity as President of Evansville Television, Inc. (TR 34-35). After Langmade returned the Class A and Class B stock to the corporation



Appellant Schepp was restrained by a temporary restraining order issued by the Probate Court of the State of Indiana on November 8, 1956, from acting in his capacity as President of Evansville Television, Inc. until further Order of the Court. (TR 35). This restraining order and injunction continued in full force and effect until the year 1960. (TR 35)

In 1957, demand was made by Langmade upon Evansville Television, Inc. demanding issue of the previously surrendered capital stock which Evansville Television, Inc. refused to do. (TR 35). In 1957 Langmade commenced an action in the United States District Court for the Southern District of Indiana, Evansville Division, against Evansville Television, Inc. asking Judgment against the corporation for \$40,000.00 and subsequently this lawsuit was dismissed by an agreement between Langmade and Evansville Television, Inc. whereby Langmade was to receive 1,000 shares of Class B and 400 shares of Class A common capital stock of Evansville Television, Inc. (TR 36)

It is the Appellees contention and the Trial Court found that the Appellant Schepp orally advised Langmade's attorney that Appellant would make up the difference between the 400 shares of Class A stock offered by the corporation and the 1,000 shares of Class A stock which Langmade was demanding and would deliver to Langmade 600 shares of Class A stock. (TR 149-150) The Appellant Schepp testified at the Trial that he never made any promises relative to supplying any additional shares from the shares which Appellant owned himself. (TP 18) Schepp also testified at the time of the Trial that he never signed any Memorandum, Agreement or letter or any other writing wherein he undertook to supply an additional 600 shares to Langmade to make up the difference between the 1,400 shares promised by Evansville Television, Inc. and the 2,000

shares which Langmade had turned in. (TP 19) As such, viewing the matter in the light most favorable to the Appellees, it can be said that at most, there was an oral statement made to Langmade's attorney by Schepp that he would deliver or cause to be delivered to Langmade the remaining 600 shares of Class A stock of Evansville Television, Inc. (See Plaintiff-Appellees Amended Complaint, pg 7, Paragraph XIII appearing at TR 7). The Defendant-Appellants on the bottom of Page 3 of their Amended Answer specifically denied any such promise. On page 7, Paragraph XIII (TR 29) Defendant-Appellants affirmatively included the statute of frauds alleging no written memorandum. Defendant-Appellants in its post Trial memorandum made a Motion to Amend the Pleadings to conform to the evidence and further to allow Plaintiff to more *specifically* plead the statute of frauds (TR 50) which was denied by the Trial Court (TR 141). Thus, as a legal matter, the Court failed to consider the statute of frauds as a defense notwithstanding the fact that the same had been sufficiently pleaded in the Amended Answer by the Defendant-Appellants as heretofore mentioned. Similarly, since the Statute of Frauds was not considered by the Trial Court, Findings of Fact numbers 18, 19, and 20 are also erroneous. (TR 149-150).

On December 30, 1955, a written agreement was entered into between Schepp and Langmade which provided that in the event either of the Defendant-Appellants Schepp should sell any of their stock, they would also sell the stock of the Plaintiff-Appellees Langmade at the same price and in an equal proportion. (TR-22) (Exhibit 4). On July 3, 1956, in another written agreement, the December 3, 1955 agreement between the Schepps and the Langmades was reiterated. (TR-13-14) (Exhibit 6). An agreement was en-

tered into between Langmade and Evansville Television, Inc during October of 1958 (TR 17-21) which was a settlement of Langmade's lawsuit against Evansville Television, Inc. whereby Langmade received 400 shares of Class A and 1,000 shares of Class B or a total of 1,400 shares of Evansville Television, Inc. stock. (See also TR 36). Sometime prior to June 28, 1962, Langmade authorized Schepp to sell 1,400 shares of Langmade's stock for the sum of \$28.00 per share or a net of \$28,000.00 with no broker's commission (Exhibit Number 14), and on June 28, 1962, Producer's Incorporated sent Langmade a check for \$28,000.00 (TR 37). On July 3, 1962, Langmade acknowledged receipt of the \$28,000.00 check and mailed the 1,400 shares of stock, Langmade then executed a receipt and assignment to Producer's Incorporated. (TR 37-38). Schepp testified that the Schepp's sold their stock after Langmade sold his. (TP 27-28) Thus, the question presented is whether there is any evidence to support Finding of Fact #21 and whether the Schepp-Langmade Agreement of December 30, 1955 (TR 22) was rescinded by Langmade's authorization to Schepp to sell Langmade's 1,400 shares for \$28.00 per share (Exhibit 14).

Subsequent to the Trial, on December 29, 1967, Defendant-Appellants filed a Motion for New Trial under Rule 60 (TR 182-194) on the ground that Defendant-Appellants were deprived of their right to a Trial by Jury and as a result were also denied due process of law for reason that the Defendant-Appellants themselves, at numerous times requested of their attorney a Jury Trial (TR 188-189) and it was always their understanding that they would receive a Trial by Jury. The Court denied Defendant-Appellants Motion for New Trial under Rule 60 on January 15, 1968. (TR 211). The question thus before the Court is whether the Defendant-Appellants were deprived of their right to a Trial by Jury and due process of law.

### **SPECIFICATIONS OF ERROR**

I. The Trial Court committed prejudicial error when it denied Defendant-Appellants motion to amend the pleadings thus refusing to consider the statute of frauds as a defense, as a result of which Findings of Fact #18, 19 and 20 are erroneous.

II. The Trial Court erred in making Finding of Fact Number 21 that the value of the six hundred shares of Class A stock was \$30.00 per share, and thereby finding damages of \$18,000.00, and Finding of Fact #22 that the December 30, 1955 contract was in effect and was breached.

III. The Trial Court committed prejudicial error in denying Defendant-Appellants Motion for New Trial under Rule 60, thus depriving the Defendant-Appellants of their Constitutional right to a Trial by Jury.

### **ARGUMENT**

**I. The Trial Court Committed Prejudicial Error in Denying Defendant-Appellants Motion to Amend the Pleadings and Thereby Refusing to Consider the Statute of Frauds as a Defense, as a Result of Which Findings of Fact #18, 19 and 20 Are Also Erroneous.**

In Paragraph XIII on page seven of Plaintiff's Amended Complaint (TR 7) the Plaintiff-Appellees alleged that the Defendant-Appellant advised Langmade and Langmade's attorney that he, Appellant, would deliver or cause to be delivered the remaining 600 shares of Class A stock of Evansville Television, Inc. This was answered by the Defendant-Appellant's Amended Answer specifically on pages 3 and 4 of said Answer (TR 25-26) wherein it was alleged as follows:

"Specifically deny the last paragraph of Paragraph XIII, commencing on line 4 of page 7 of Plaintiff's Amended Complaint and allege that the Defendant, Rex Schepp did not, at any time promise that he would

deliver or cause to be delivered to Stephen W. Langmade any additional shares . . .” (TR 25-26)

Answering the second claim of Plaintiff’s Complaint Defendant-Appellants incorporated by reference the same specific denial of any oral promise to deliver stock by Schepp which appears in Paragraph I of the Answer to the second claim on page 4 of Defendant-Appellant’s Amended Answer (TR 26). Further, in Paragraph XIII appearing on page 7 of Defendant’s Amended Answer (TR 29), the Defendant-Appellants alleged that there was no written memorandum whereby Schepp agreed to deliver the six hundred shares as alleged in Plaintiff’s Complaint.

As such, it can be clearly seen that Section 44-101 of Arizona Revised Statutes, 1956, the Statute of Frauds, was alleged as a separate and affirmative defense even though the exact words “STATUTE OF FRAUDS” were not used. However, it is also submitted that it is not necessary to allege the exact title of the statute, but the mere substance of the statute having been alleged, was sufficient.

In 37 CJS 275, Statute of Frauds, pg 800, it is stated that, “. . . it is not necessary to refer to the Statute by name; it is enough to allege facts bringing the case within its provisions.”

In the case of *Kohlprecher v. Guettermann*, 329 ILL 246, 160 NE 142 (1928), the Court stated as follows:

“. . . the rule in pleading the Statute of Frauds is that express reference to the Statute is *not necessary* but sufficient facts must be stated to show that the Defendant seeks the protection of the Statute.” (Emphasis supplied)

Thus the Defendant’s allegation that there was no written memorandum was clearly sufficient to plead the Statute of Frauds. Again, the Defendant-Appellants express denial

and affirmative allegation that Rex Schepp did not, at any time, promise that he would deliver or cause to be delivered to Langmade any additional shares appearing in Paragraph VIII of Defendant-Appellant's Answer to the First Claim and incorporated by reference in Paragraph I in Answer to the Plaintiff's Second Claim (TR 25-26) was sufficient to allege the Statute of Frauds as a defense to both the first and second claims of Plaintiffs Amended Complaint.

In support of this the case of *Cook v. Cave*, 260 S.W. 49, (Ark. 1924) is cited. The same question came up in the Cook case, *supra*, and on page 51 the Court Stated as follows:

"the Plaintiff filed a reply to the Answer in which he denied making the nude verbal agreement with the Defendant. The denial in the replication of the Plaintiff of the making of the oral contract on which the Defendant based her cross action is *as effective for letting in the defense of the Statute of Frauds as if the statute had been specifically pleaded*. The reason is that the reply denied the existence of a new agreement and it was incumbent upon the defendant to prove a legal agreement which in cases within the Statute of Frauds must be a written one . . . we think it clear upon principal under our statute of frauds and system of pleading that *it is sufficient to deny the contract without referring to the Statute*. Where the pleadings present the issue of agreement, or no agreement, the party relying upon the agreement must prove a valid one. If the Plaintiff had admitted that a verbal agreement had been made as alleged by the Defendant, then he must have pleaded the statute of frauds in order to rely upon it. *The Plaintiff having denied in his reply the oral agreement alleged in the answer, the statute of frauds became a question of fact at the hearing.*" (Emphasis supplied)

Thus it appears that the denial effectively and affirmatively pleaded the Statute of Frauds as a defense.

In the Defendant-Appellants opening post Trial Memorandum, the Defendant made a Motion to amend the pleadings and it is respectively submitted that the Defendant's Motion should more properly have been entitled a Motion to "Characterize" the statute of frauds as properly having been pled. Had the Court considered the defense of statute of frauds, it would have found in Defendant's favor.

In the case of *Humphrey v. Faison*, 247 N.C. 127, 100 S.E.2d 524 (1957) the Supreme Court of North Carolina stated as follows:

"the Defendant in this action denied in her answer that the alleged oral agreement was ever made. Such denial invoked the statute of frauds as effectively as if it had been expressly pleaded. Furthermore, a denial of the agreement is equivalent to a plea of the statute."

In accord *Hunt v. Hunt* 261 N.C. 437, 135 S.E.2d 195 (1964). See also *Bauer v. Monroe*, 117 Mont. 306, 158 P.2d 485 (1945); *Collett v. Goodrich*, 119 Utah 662, 231 P.2d 730 (1951); *Tadgham v. Wilson Music Co.* 3 Wis. 363, 88 N.W.2d 679 (1958).

In the case of *San Francisco Brewing Corp. v. Bowman*, 52 C.A.2d 607, 343 P.2d 1 (1959) the Supreme Court of California stated as follows:

"Defendant also says that Plaintiff waived its right to rely upon the statute (of frauds) by not specifically pleading the statute and by not objecting to testimony in proof of the contract. But, Plaintiff denied the making of the contract in toto and that has been held sufficient to justify reliance upon the statute of frauds." Followed in *Connelly v. Venus Foods, Inc.* 345 P.2d 117 (Calif. 1959)



It is the Appellants position that the Appellant's Answer as heretofore mentioned which denied specifically the oral contract raised the statute of frauds. The Court, having failed to consider said defense, committed prejudicial error.

On May 16, 1967, the date of the Trial, the Court ordered the case taken under advisement, and ordered respective counsel to file memoranda. (TR 210). In accordance with the Order of the Court, the Defendant-Appellants filed their Opening Memorandum on June 16, 1967, which included a Motion to Amend the Pleadings to conform with the evidence (TR 50) to set forth facts and circumstances which would make clear the Defendants Affirmative Defense of Statute of Frauds. The Court denied Defendant-Appellants' Motion to Amend the Pleadings on July 6, 1967 (TR 141). At this point, it is respectfully submitted that the Court committed prejudicial error in denying Defendant-Appellants Motion to Amend the Pleadings and thus denying to Defendant-Appellant the defense of STATUTE OF FRAUDS. It is the Appellants opinion position that the Court's Order denying Defendant-Appellants Motion to Amend the Pleadings was an abuse of the Court's discretion in the matter and was prejudicially erroneous.

**II. The Trial Court Committed Prejudicial Error in Making Finding of Fact #21 That the Value of the Class A Stock of Evansville Television, Inc., Was \$30.00 Per Share, and Thereby Finding Damages of \$18,000.00, and in Making Finding of Fact #22 That the December 30, 1955 Agreement Was in Effect and Was Breached.**

On June 25, 1962, Appellee-Langmade, dispatched a communication to the Appellant Schepp authorizing Schepp to Sell 1,400 shares of Langmade's stock for \$20.00 per share or a net of \$28,000.00 (TR p. 37, 82) (Exhibit No. 14). On June 28, 1962, Producers, Inc., directed a letter to "Lang-



made accepting Langmade's authorized offer and enclosed a check for \$28,000.00 to Langmade. (TR 37, 82) It is the Appellant's position that the authorization of June 25, 1962, by Langmade to Schepp, to sell Langmade's 1400 shares of stock at \$20.00 per share or a net of \$28,000.00, legally operated as a rescision of the December 30, 1955 agreement between Schepp and Langmade (Exhibit Number 4) (TR 22). In making Findings of Fact #21 & 22, the Court committed prejudicial error because those findings are based upon the fact that there was a breach of the December 30, 1955, contract between the parties. To reiterate, it is the Appellant's position that the December 30, 1955, agreement by the parties was rescinded when Langmade authorized Schepp to sell Langmade's shares at \$20.00 per share and when Langmade accepted the Producer's check for \$28,000.00. Schepp was discharged from the agreement by Langmade's June 25, 1962 authorization. Langmade's act of authorizing Schepp to sell the 1400 shares at \$20.00 per share and the immediate reply from Producer's directed to Langmade together with the \$28,000.00 check from Producer's for the shares certainly amounted to acts and conduct of the parties completely and totally inconsistent with the continued existence of the December 30, 1955, agreement.

In 17 Am Jur2d, Contracts, Sec. 494, it is stated as follows:

"a contract may be rescinded or discharged by acts or conduct of the parties inconsistent with the continued existence of the contract and mutual assent to abandon a contract may be inferred from the attendant circumstances and conduct of the parties." (Cases cited)

The December 30, 1955 agreement (TR 22) provided that if the Schepps should sell any of their stock, they would also sell Langmade's stock at the same price and in the same proportion. This agreement of December 30, 1955 did

not provide for any limitation of time and in such cases the law implies a reasonable time where the continuation of a contract is without definite duration. At most the contract could be considered as one terminable at will. 17 Am. Jur.2d Contracts, Sec. 486; *Ansbacher-Siegle Corp. v Miller Chemical Co.* 137 Neb. 142, 288 N.W. 538; *Grand Lodge Hall Assoc. v. Moore*, 224 Ind. 575, 70 N.E.2d 19, 173 A.L.R. 6 Affd 330 U.S. 808, 91 L.ed 1265, 67 S.Ct. 1088, Rehearing Denied 333 U.S. 864, 91 L.ed. 1869, 67 S.Ct. 1201.

Viewing the contract and agreement of December 30, 1955, in the light most favorable to the Appellees, the Trial Court should have found that the contract was terminable at will, and Langmade, by his authorization to Schepp to sell Langmade's shares at \$20.00 per share, terminated the contract and discharged Schepp from its terms. It is interesting to note that Langmade waited six and one half years from the December 30, 1955 contract until June 25, 1962 when he authorized Schepp to sell his shares at \$20.00 per share.

Thus, it is the Appellants position that the Court erred in making Findings of Facts #21 & 22 finding the value of the shares at \$30.00 per share based upon the Finding of Fact #22 that the contract of December 30, 1955 was valid and that the Defendant-Appellant's breached said contract.

### **III. The Trial Court Committed Prejudicial Error in Denying Defendant-Appellant's Motion for New Trial Under Rule Sixty, Thus Depriving Defendant-Appellants of Their Constitutional Right to a Trial by Jury and Due Process of Law.**

Appellant Schepp, in his affidavit (TR 190) stated that when he retained attorney Joseph B. Miller, he specifically asked if a Jury would be secured and Mr. Miller responded in the affirmative. On numerous occasions appellant instructed his attorney to demand a Jury Trial (TR 190). On

August 6, 1966, Appellant, Rex Schepp wrote a letter to Mr. Miller stating that he requested a Jury Trial and asking Mr. Miller if he had asked for this (TR 188). Mr. Miller responded on August 9, 1966, in a letter to Schepp that "we are asking for a Trial by Jury" (TR 189). On December 27, 1967, for the first time, Appellant brought these facts to the attention of his attorney, Charles C. Stidham. (TR 194) Immediately a Motion for New Trial under Rule Sixty was filed (TR 182) which was denied by the Court on January 15, 1968 (TR 211).

It is the Appellant's position that the Appellants were denied their right to a Jury Trial and due process of law under the UNITED STATES CONSTITUTION, Amendments VII, and XIV-Section 1 (Due Process Clause); Federal Rules of Civil Procedure, Rule 38 (a); CONSTITUTION OF THE STATE OF ARIZONA, Article II, Section 23; Arizona Rules of Civil Procedure, Rule 38 (a), Arizona Revised Statutes, 1956; and Arizona Rules of Civil Procedure, Rule 38(d), Arizona Revised Statutes, 1956.

Rule 38(d) of the Arizona Rules of Civil Procedure, *supra*, provides as follows:

"... a demand for Trial by Jury made as herein provided may not be withdrawn without the consent of the *parties*." (Emphasis supplied)

The summary of the official Court record and docket reveals that on February 14, 1964, the Plaintiff-Appellees filed a Motion to set for a Trial to a Jury. (TR 209). On January 23, 1966, the Trial Court entered a Pre-Trial Order that the Trial would be re-set for Tuesday, May 16, 1967, *before a Jury* (TR 210). On pg. 5 of the Plaintiff's response to Defendant's Motion for New Trial under Rule Sixty (TR 200), the Plaintiff-Appellees set forth the text of the Pre-Trial Order entered May 8, 1967, by the Trial

Court. No where does said Pre-Trial Order provide that Trial was to be had to the Court sitting without a Jury.

Rule 39(a) of the Federal Rules of Civil Procedure, USC, provides as follows:

“(a) by Jury. When Trial by Jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a Jury action. The trial of all issues so demanded shall be by Jury *unless* (1) the parties or their attorneys of record, by written stipulation *filed with the Court* or by an oral stipulation made in open Court and *entered in the record*, consent to Trial by the Court sitting without a Jury or (2) the Court upon Motion or of its own initiative finds that a right of a Trial by Jury of some or all of those issues does not exist under the Constitution or Statutes of the United States.”

The only writing filed was on May 16, 1967, the trial day, which was the minute order, in accordance with a stipulation of counsel to the effect that *counsel* had waived a Jury Trial in the case.

Thus, it can be clearly seen that, pursuant to Rule 39(a) of the Federal Rules of Civil Procedure, there was no stipulation entered into the record until the Trial itself. The Appellant Schepp was under the impression that a Jury Trial would be had and never authorized or consented to his attorney waiving the Jury Trial.

In the recent Arizona case of *Wiseman v. Young*, 4 Ariz. App. 573, 422 P.2d 404 (1967), the Court of Appeals of Arizona was confronted with a similar fact situation wherein the Plaintiff demanded a Jury Trial in compliance with Rule 38 of the Arizona Rules of Civil Procedure, ARS, 1956 the source of which is Federal Rule of Civil Procedure #38, USC. On the day preceding the Trial, counsel for both parties, *on the advice of their clients* agreed to

waive a Jury Trial and so advised the assignment clerk according to local custom. Minutes later, the Defendants counsel was notified by his client that a Jury Trial should be demanded and the Defendant's counsel communicated this to the assignment clerk who in turn advised counsel that the Judge had refused to allow the Jury to be recalled. The Court of Appeals of Arizona reversed the Judgment and remanded the case for a new trial stating as follows:

"... there was no waiver of a Jury Trial in the manner prescribed by the ARIZONA RULES OF CIVIL PROCEDURE, i.e., written waiver filed with the clerk or an oral stipulation made in open Court and entered in the record. Despite the local custom of waiving a Jury Trial by communicating such agreement to the assignment clerk, we think compliance with the rules in waiving a Jury Trial is as compelling as is compliance with the rules in demanding a Jury Trial."

It would seem to be the Appellees position that during the Pre-Trial Conference on May 8, 1967, counsel agreed to waive a Jury Trial, however, a minute Order was not entered in open court until the morning of the trial, *approximately a week later*. (TR 203). It is the position of the Appellants that if counsel agreed to waive a Jury Trial on May 8, 1967, the Pre-Trial Order should have incorporated this or a minute Order to this effect should have been entered on May 8, 1967. It is interesting to note that the Appellees position is that the stipulation of counsel was made *at the Pre-Trial*, but was not entered until the day of Trial. As such, it is the Appellants position that Rule 39 (a) of the Federal Rules of Civil Procedure was not followed in that (1) no written stipulation was filed by the Court and (2) any oral stipulation as to waiving the Jury Trial that was allegedly made on May 8, 1967, was not "an oral stipulation made in open court and entered in the record" as required

by Rule 39, but rather the Stipulation was allegedly made on May 8, 1967 and approximately one week later, on the morning of the Trial, no further stipulation was made in open court but the previous oral stipulation was then entered into the record. It is the Appellant's position and it is respectfully submitted that the Trial Court committed prejudicial error in hearing the case without a Jury and subsequently, in the denial of the Defendant-Appellant's Motion for New Trial under Rule Sixty as heretofore stated.

### **CONCLUSION**

Therefore, Appellants respectfully request that this Court reverse the Judgment of the Trial Court and that a New Trial be granted for the Trial Court's error in refusing to consider the Statute of Frauds as a defense available to Appellants and/or the erroneous Findings of Facts #21 and 22 and for committing prejudicial error in denying Appellants right to a Trial by Jury and denial of Appellant's Motion for New Trial under Rule Sixty.

Respectfully submitted,

CHARLES C. STIDHAM  
WELLIEVER, STIDHAM, SMITH & HOLT  
*Attorneys for Appellants*

### **CERTIFICATE**

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

CHARLES C. STIDHAM

**(Appendix Follows)**







### *Appendix*

Exhibit Number 4—introduced and received in evidence—  
Page 5 and 7.

Exhibit Number 6—introduced and received in evidence—  
Page 5 and 7.

Exhibit Number 14—introduced and received in evidence—  
Page 5 and 7.

All other Exhibits—received in evidence—Page 7.



No. 22638

In The  
UNITED STATES COURT OF APPEALS  
For The Ninth Circuit

\_\_\_\_\_  
REX SCHEPP, et ux,

Appellants,

v.

ELLEN LANGMADE, et al,

Appellees.  
\_\_\_\_\_

On Appeal from the United States District Court  
For the District of Arizona

\_\_\_\_\_  
BRIEF FOR APPELLEES  
\_\_\_\_\_

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ATTORNEYS FOR APPELLEES

FILED

JUL 8 1968

WM. B. LUCK, CLERK



In The  
UNITED STATES COURT OF APPEALS  
For The Ninth Circuit

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REX SCHEPP, et ux,

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## RULES

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In The  
UNITED STATES COURT OF APPEALS  
For the Ninth Circuit

REX SCHEPP, et ux.,	)	
	)	
Appellants,	)	
	)	
v.	)	No. 22638
	)	
ELLEN LANGMADE, et al.,	)	
	)	
Appellees.	)	
	)	

---

BRIEF FOR APPELLEES

II.

SUMMARY OF THE ARGUMENT

1. The granting or denial of an application to amend is within the discretion of the trial judge, whose ruling will not be disturbed unless there has been an abuse of discretion.

2. The statute of frauds must be pleaded affirmatively.

3. Defendants should not be allowed to amend their answer after trial so as to set up a defense of the statute of frauds, in addition to that pleaded by their answer.



4. The price for which Schepp sold the Class A stock is determinative of its value in this litigation.

5. Rule 60 is not intended to provide relief for error on the part of the court, or to afford a substitute for appeal.

6. A motion to vacate judgment under Rule 60 is addressed to the sound discretion of the District Court and will not be disturbed on appeal except for abuse of discretion.

7. Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

8. Waiver of trial by jury, by the attorney for a party, binds the party as effectively as if he had effected the waiver by his own action.



### III.

#### THE ARGUMENT

1. The Granting or Denial of an Application to Amend is Within the Discretion of the Trial Judge, Whose Ruling Will Not be Disturbed Unless There Has Been an Abuse of Discretion.

The above statement is supported by the decisions of this court in:

*Wittmayer v. United States* (9th Cir.)  
118 F.2d 808, 809

*American National Insurance Company v. Yee Lin Shee* (9th Cir.) 104 F.2d 688, 695

2. The Statute of Frauds Must be Plead Affirmatively.

Rule 8(d) of the Arizona Rules of Civil Procedure [which is a rescript of Rule 8(c) of the Federal Rules of Civil Procedure] reads, so far as here material:

"\* \* \* in pleading to a preceding  
pleading, a party shall set forth af-  
firmatively \* \* \* statute of frauds \* \* \*"

The Arizona Supreme Court has definitely held that one relying upon the statute of frauds as a defense, must plead the same affirmatively.

*Mallamo v. Hartman*,  
70 Ariz. 294, 219 P.2d 1039, 1041;  
70 Ariz. 420, 222 P.2d 797





The same rule appears to have been followed in *Piest v. Tide Water Oil Company* (D.C. N.Y.) 41 F. Supp. 299.

3. Defendants Should Not be Allowed to Amend Their Answer After Trial so as to Set up a Defense of the Statute of Frauds, in Addition to that Plead by Their Answer.

The above statement appears to find support in:

*Gaines W. Harrison & Sons v. J. I. Case Co.* (D.C. S.C.) 180 F. Supp. 243

Throughout their argument appellants state, in effect, they did not plead the statute of frauds by their answer, and that the court's refusal to permit them to amend after trial, constituted prejudicial error.

By paragraph XIII of their answer to appellees' amended complaint, the appellants allege:

"Allege that there is no written memorandum whereby said REX SCHEPP agreed to deliver the six hundred (600) shares surrendered by the late Stephen W. Langmade as alleged in plaintiffs' Complaint, and that the value of such shares exceed the sum of Five Hundred Dollars (\$500.00)."

(TR 29)



They now complain because the trial court refused them permission to amend their answer by alleging in substance the same thing they had affirmatively alleged in their original answer. Their motion in that respect is found at pages 50 to 51 of the transcript of record. They complain that the refusal of the trial court to allow such amendment prevented their defense based upon the statute of frauds. To appellees, it seems that had the court granted their motion to so amend, the legal effect of their answer, if so amended, would be the same as that set forth in their original pleading.

Just what appellants expect to accomplish by their suggested amendment, in view of the agreed statement of facts upon which the action was largely tried, does not appear too clear.

4. The Price for Which Schepp Sold the Class A Stock is Determinative of its Value in This Litigation.

Appellees concede that Langmade authorized sale of the Class A Stock at \$20.00 per share. It is equally true Schepp sold the stock for \$30.00 per share but did not account for the Langmade stock. The trial court determined the value of the Langmade stock to be \$30.00 per share.



Appellants now assert the trial court should have fixed the value of the Langmade stock at \$20.00 per share instead of the \$30.00 which Schepp received.

Appellants' contention is wholly without merit and is contrary to the decision of the Arizona Supreme Court in:

*Mandl v. City of Phoenix*,  
47 Ariz. 351, 18 P.2d 271, 272

5. Rule 60 is Not Intended to Provide Relief for Error on the Part of the Court, or to Afford a Substitute for Appeal.

The above statement finds support in *Title v. United States* (9th Cir.) 263 F.2d 28.

6. A Motion to Vacate Judgment Under Rule 60 is Addressed to the Sound Discretion of the District Court and Will not be Disturbed on Appeal Except for Abuse of Discretion.

The foregoing statement is supported by two decisions of this court:

*Kolstead v. United States* (9th Cir.)  
262 F.2d 839

*Perrin v. Aluminum Company of America*  
(9th Cir.) 197 F.2d 254



7. Findings of Fact Shall Not be Set Aside Unless Clearly Erroneous and Due Regard Shall be Given to the Opportunity of the Trial Court to Judge the Credibility of the Witnesses.

Rule 52 of the Federal Rules of Civil Procedure reads, in part, as follows:

"\* \* \* findings of fact shall not be  
set aside unless clearly erroneous  
and due regard shall be given to the  
opportunity of the trial court to  
judge the credibility of the wit-  
nesses \* \* \*"

The rule is discussed in *Glens Falls Indem. Co. v. United States ex rel. and to Use of Westinghouse Elec. Supply Co.* (9th Cir.) 229 F.2d 370.

8. Waiver of Trial by Jury, by the Attorney For a Party, Binds the Party as Effectively as if he had Made the Waiver by his Own Action.

It has been repeatedly held by state and federal courts that the actions of counsel, with respect to matters of trial, are to be treated as the actions of the client.





*Avery v. Calument & Jerome Copper Company*,  
36 Ariz. 329, 284 Pac. 159

*Coconino Pulp & Paper Company v. Marvin*,  
83 Ariz. 117, 317 P.2d 550

*Irvin v. Dwight B. Heard Investment Company*,  
35 Ariz. 528, 281 Pac. 213

*State v. Haley*,  
87 Ariz. 29, 347 P.2d 692

*National Labor Relations Board v. Lewis*  
(9th Cir.) 249 F.2d 832, 838;  
*affirmed* 357 U.S. 10,  
78 S. Ct. 1029, 2 L. Ed.2d 1103

*Graham v. Squier*,  
45 F. Supp. 253, 254; *affirmed upon*  
*other grounds* 132 F.2d 681

*Heckin v. First National Bank*,  
5 Ariz. App. 379, 427 P.2d 360, 366

Besides, there was no substantial issue of fact for determination by a jury. Other than the value of the Class A stock, practically all possible issues were determined by the agreed statement (TR 32-38).

Appellees have not seen fit to challenge the authority of their attorneys to execute, upon their behalf and binding upon them, such agreed statement of facts.



IV.

CONCLUSION

Upon the record in this cause now upon appeal, it is most respectfully insisted the judgment of the District Court should be affirmed.

Respectfully submitted,

JAMES E. FLYNN and  
ALLAN K. PERRY  
Attorneys for Appellees

By /s/ Allan K. Perry

---

ALLAN K. PERRY

V.

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Allan K. Perry

---

ALLAN K. PERRY



NO. 22889

**United States Court of Appeals**  
**FOR THE NINTH CIRCUIT**

THE UNITED STATES OF AMERICA,  
For the Use and Benefit of  
C. H. BENTON, INC. , a California  
Corporation,

Plaintiff and Appellant,

vs.

ROELOF CONSTRUCTION COMPANY,  
doing business as TRUETT PAINTING  
COMPANY; and FIDELITY AND CASUALTY  
COMPANY OF NEW YORK,

Defendants and Appellees.

On Appeal From the United States District Court  
For the Southern District of California

---

APPELLANT'S OPENING BRIEF

---

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FILED

MAR 20 1968

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

THE UNITED STATES OF AMERICA,  
For the Use and Benefit of  
C. H. BENTON, INC., a California  
Corporation,

Plaintiff and Appellant,

vs.

ROELOF CONSTRUCTION COMPANY,  
doing business as TRUETT PAINTING  
COMPANY; and FIDELITY AND CASUALTY  
COMPANY OF NEW YORK,

Defendants and Appellees.

---

APPELLANT'S OPENING BRIEF

---

JURISDICTIONAL STATEMENT

This was an action under the Miller Act (40 U. S. C. 270b) for materials furnished within the Southern District of California for the performance of a contract with the United States Government on government buildings (Complaint Paragraphs I and III, Pre-Trial Stipulation and Order Paragraphs I, II and III) and jurisdiction is exclusively within the United States District Court for that district under the provisions of Subdivision b of 40 U. S. C. 270b.

Jurisdiction of this Court to hear this appeal is based upon 28 U. S. C. 1291.

## STATEMENT OF THE CASE

Roelof Construction Company was the prime contractor in painting some United States Government buildings (Bayview-Cabrillo housing), (Pre-Trial Stipulation and Order Paragraph IIIa). Use plaintiff, Benton, supplied \$31,441.72 worth of paint for this job (Pre-Trial Stipulation and Order Paragraph IIIc). Benton claimed it was still owed \$4,983.09 for this paint (Pre-Trial Stipulation and Order Paragraph IIIe). Defendants admitted that Roelof owed Benton more than this amount, but claimed that certain payments that had been credited to other jobs should have been applied to this job and that, therefore, this job was fully paid (Pre-Trial Stipulation and Order Paragraph IIIe). Fidelity and Casualty Company furnished Roelof's bond as required by 40 U. S. C. 270a (Pre-Trial Stipulation and Order Paragraph IIIf).

## SPECIFICATION OF ERROR

The Trial Court clearly erred in its express finding that: "There is no question but that Benton was aware of the source of funds (which Benton received from Roelof) and should have applied such funds to the bonded jobs and not to the other due accounts", and in the implied finding that the source of such funds was the money paid by the United States Government to Roelof for the painting which it performed on the Bayview-Cabrillo housing job.

## SUMMARY OF ARGUMENT

There was no evidence whatsoever that any of the money which Roelof paid Benton found its source in the Bayview-Cabrillo housing job and no evidence whatsoever that Benton had any knowledge that the Bayview-Cabrillo housing job was the source of any of the funds that it received.

There was also no evidence from which any inference could be drawn that this job was the source of any funds that Benton received and credited to other jobs or that Benton had any knowledge of the source of the funds that it received from Roelof.

### FACTS AND EVIDENCE

As previously stated, this case arose out of the furnishing of paint for a government contract NBY 69866 for the repainting of buildings at Cabrillo and Bay-view housing located within the Southern District of California (Paragraph I of the Pre-Trial Stipulation and Order).

The paint was, in fact, so furnished and used (Paragraph IIa of Pre-Trial Stipulation and Order) and defendant, Fidelity and Casualty Company of New York, furnished the bond as required by 40 U. S. C. 270a (Paragraph IIb of the Pre-Trial Stipulation and Order). The total cost of this paint was \$31,441.72 (Paragraph IIc of the Pre-Trial Stipulation and Order). Use plaintiff, Benton, claimed that \$4,983.09 of this was unpaid and defendants admitted that they owed Use plaintiff more than this amount, however, they contended that this particular bill was paid and that payments that Roelof had made were improperly credited to other jobs (Paragraph IId of the Pre-Trial Stipulation and Order). The only issue in this case was whether certain payments made by Roelof to Benton were improperly credited to other jobs so that Use plaintiff had been paid in full for the paint used on the Bay-view-Cabrillo job (Paragraph IId of the Pre-Trial Stipulation and Order).

## EVIDENCE CONCERNING THE PAYMENTS

The first invoice on the Bayview-Cabrillo job is number 135862 dated August 24, 1965 in the amount of \$65.48 (Plaintiff's Exhibit 1) and at that time defendant, Roelof, owed Use plaintiff, Benton, \$5,025.93 on open account (Plaintiff's Exhibit 2).

Charges were made and payments were credited on this open account, without regard to the job involved, until November 4, 1965, at which time Use plaintiff began to note on its ledger the particular job for which charges were made (Plaintiff's Exhibit 2) because Roelof was falling behind (Rep. Tr., p. 6, ll. 9-20) in their payments.

According to Roelof's own records (Defendants' Exhibit G) Roelof paid the September account in full on November 18, 1965, by check no. 322 for \$6,259.41, (a prior payment on the September account was made October 2, 1965 by check no. 275 for \$2,768.35 marked "invoices"). It paid the October account in full on December 22, 1965 by check no. 369 for \$7,028.02, and marked "Roelof Construction a/c". It paid the November account in full on January 20, 1966 by check no. 409 for \$5,789.40 and it paid \$5,000.00 on the December account by check no. 477 on February 17, 1966. There was no testimony whatever by any witness as to the source of the funds used to make any of these payments.

Benton's ledger shows that each of these payments was credited in the same manner as shown on Roelof's records (Plaintiff's Exhibit 2) (that is an open account) and there was no controversy during the trial as to whether or not any of these payments were correctly credited.

The next payment was made on April 18, 1966 by check no. 573 for \$2,000.00 and since it was intended to be credited on the Bayview-Cabrillo job (Defendants' Exhibit K) and was so credited (Plaintiff's Exhibit 3), there can be no controversy about this payment. Its source was not disclosed by any testimony or evidence.

The next payment was for \$2,000.00 by check no. 619 on May 16, 1966 and, although Roelof had marked it as being only partially made on the Bayview-Cabrillo job (Defendants' Exhibit K), it was credited in its entirety to this job (Plaintiff's Exhibit 3). Its source was likewise not disclosed by any testimony.

The next payment was made on May 20, 1966 in the amount of \$3,166.00 and Roelof's Vice President, Truett, testified that Roelof intended all of it to be credited on the Bayview-Cabrillo job. (Rep. Tr., p. 61, ll. 13-17 and Defendants' Exhibit K). Benton was not informed of this intent, however (Rep. Tr., p. 59, ll. 10-17). Benton credited it entirely to the Vacation Village job (Plaintiff's Exhibit 2). Truett testified that the source of the funds for this particular check was a joint check "from the Vacation Village People" (Rep. Tr., p. 63, ll. 18-20 and p. 65, ll. 4-7). However, he said that he thought Benton could credit it "any way" (Rep. Tr., p. 64, ll. 18-23).

Benton gave Roelof a lien release on this Vacation Village job dated May 5, 1966 (Plaintiff's Exhibit 7), the date of its delivery is not disclosed by the evidence.

The next credit shown on Plaintiff's Exhibit 2 is for June 6, 1966 in the amount of \$768.18, credited to "North Island" and is for the exact amount of the invoices on this job. No controversy appeared to exist regarding this credit and the

check is not included in Defendants' Exhibit H. There was no testimony regarding the source of the funds used to make this payment.

The next payment is for \$708.56 on June 7, 1966 and is credited to "Brown 6618" and a notation on the May bill (Part of Defendants' Exhibit G) shows that the Brown bill was paid June 3 by check no. 641. (This check was not included in Exhibit H either). Apparently there was no controversy about this check and there was no testimony as to the source of the funds used to make this payment.

The next payment was June 15, 1966 by check no. 673 in the amount of \$3,100.00. This check states on its face that it is for the Hanalei Hotel, "G. L. Cory job", and it was so credited (Plaintiff's Exhibit 2). There is a conflict in the evidence as to whether this was written on the check when Roelof issued it.

Truett testified and defendants' Exhibit K indicates that Roelof intended \$2,162.64 of this June 15, 1966 check to be credited to the Bayview-Cabrillo job and that this, together with the May 20, 1966 check for \$3,166.00, would pay that job off in full (Rep. Tr., p. 56, ll. 7-10 and p. 52, ll. 19-21). He admitted that Benton was not informed of this intent (Rep. Tr., p. 59, ll. 10-17).

There was no testimony whatever as to the source of the funds used to make this payment.

About June 22, 1966, Truett requested a lien release on the Hanalei job (Rep. Tr. p. 12, l. 23, p. 13, l. 1 and p. 46, ll. 11-14), a conference was held between Charles Benton, William Benton, Truett and (Ralph) Roelof (President of Roelof Construction Co.) at which time Benton demanded that they receive some money (Rep. Tr., p. 13, ll. 2-6) which they received (Rep. Tr., p. 13, ll. 7-8).



Charles Benton was not sure of the amount but Plaintiff's Exhibit 2 shows that there was a \$2,000.00 check (no. 563, Defendants' Exhibit H) credited to the Hanalei job on June 22, 1966 (there appears to be no contention that this was improperly credited). There was no testimony as to the source of the funds paid by this check, although there is a reasonable inference that it came from G. L. Cory on the Hanalei job since Charles Benton testified that Cory promised to advance Truett enough money to pay Benton's material bill and that he did do so. (Rep. Tr., p. 18, ll. 18-24) (Defendants' Exhibit L also shows a \$2,000.00 credit on Hanalei without date).

Benton also demanded and received two assignments (Defendants' Exhibits B and C) for \$3,300.00 due from Golden Construction Company on the Vacation Village job and one for approximately \$1,100.00 due from Charlie Brown on the Hanalei Hotel job and a promissory note for \$5,736.98 (Defendants' Exhibit A).

Upon receipt of these, Benton gave Roelof the lien release (Defendants' Exhibit D) on the Hanalei job (Rep. Tr., p. 47, ll. 6-10).

Charles Benton testified that the Roelof note covered the completed jobs, including Bayview-Cabrillo (Rep. Tr., p. 16, l. 2 to p. 18, l. 1 and p. 75, ll. 18-24), and see Plaintiff's Exhibit 4, together with the explanation that the red "N"'s indicated the jobs that were included in the note (Rep. Tr., p. 15, ll. 11-14). He also testified that Plaintiff's Exhibit 4 was present when the conference was held with Truett and Roelof regarding the Hanalei release and that he believed it was shown to Truett (Rep. Tr., p. 15, ll. 15-22), that the whole matter was thoroughly discussed by all four of them (Rep. Tr., p. 74, l. 15 to p. 75, l. 24) and that he gave Truett a breakdown of the amount at that time (Rep. Tr., p. 10, ll. 1-6). This testimony

was corroborated by William Benton (Rep. Tr., p. 69, l. 19 to p. 70, l. 25).

Truett testified that there was no discussion as to what the note was for (Rep. Tr., p. 41, ll. 12-16) that "it was a discussion", that the note was for the balance owed Benton or just about all the balance due with the two assignments (Rep. Tr., p. 43, l. 24 to p. 44, l. 23). No particular jobs were specified, (Rep. Tr., p. 50, ll. 5-8) that he had no reason to assume that we were even discussing Cabrillo "because, according to my credits on my books, we didn't owe anything on the Cabrillo job" (Rep. Tr., p. 42, ll. 1-6). However, he had no knowledge today of what the breakdown is in the promissory note, except for what he heard Charles Benton testify to (Rep. Tr., p. 34, ll. 4-10).

In connection with this discussion, Charles Benton testified that the assignments were taken mainly for the Hanalei job (Rep. Tr., p. 75, ll. 14-17) (at that time the balance due on this job, according to Benton's ledger, was \$4,643.91).

Although G. L. Cory, the general or prime contractor, on the Hanalei job, had assured Benton that he would advance Truett enough money to pay Benton's material bill, which he did (Rep. Tr., p. 18, ll. 18-24), whether or not Benton ever received any of this money was not shown because of defendant's objection (Rep. Tr., p. 27, l. 24 to p. 29, l. 16). However, as has been pointed out, there is a reasonable inference that Benton received \$2,000.00 of it.

Benton received \$1,018.00 from the Charlie Brown assignment by joint check on July 22, 1966 (Plaintiff's Exhibit 6) (Roelof's check for this (no.717) also included \$742.23 for Ft. Defiance (Defendants' Exhibit A)) and \$3,300.00 from a joint check from Vacation Village in the amount of \$3,469.00 (Plaintiff's Exhibit 5)



on July 28, 1966. The difference is because Benton let Roelof keep \$169.00 of this check (Rep. Tr., p. 21, ll. 15-24).

The \$1,018.00 was credited to the Hanalei job as indicated on the check no. 717, and the \$3,300.00 was credited: \$429.40 to "Vacation Village", \$156.19 to "Brown 6618" and \$2,714.37 to "Hanalei" (Plaintiff's Exhibit 2).

### ARGUMENT AND AUTHORITIES

As previously stated, it was stipulated that the only issue in this case was whether payments made by Roelof to Benton were improperly credited by Benton to other jobs instead of the "bonded job" (Bayview-Cabrillo) and as to this issue defendants had the burden of proof, Desjardins vs. Desjardins, 308 F.2d 111 at 116, Central California Commercial College vs. Shrewsbury, 150 Cal. App. 2d 203. Two categories of payments are involved, they are:

1. Payments made before May 20, 1966, which were not specifically allocated on Benton's ledger;
2. Payments made after May 20, 1966, all of which were specifically allocated on Benton's ledger to jobs other than Bayview-Cabrillo.

While there was evidence that two other jobs were separately billed and paid (Rep. Tr., p. 38, l. 17 to p. 41, l. 11, and Defendants' Exhibits I and J), there is nothing in the testimony that would relate either of these jobs or the payments made on them to this controversy and nothing at all about the source of the funds used to make these payments (both of which were made after May of 1966).

Clearly, those payments in category 1 made on January 20, 1966, February 18, 1966, April 18, 1966 and May 16, 1966 were credited on the Bayview-Cabrillo

job (Plaintiff's Exhibit 3). These total \$14,789.40.

Since the total job cost was stipulated to be \$31,441.72, it necessarily follows that \$11,669.23 of other payments in category 1 were credited to the Bayview-Cabrillo job (\$31,441.72 minus \$14,789.40 and \$4,983.09 [the balance claimed to be unpaid] equals \$11,669.23).

Defendants claimed at the trial and attempted to prove that since they had intended certain payments in category 2 to be credited the Bayview-Cabrillo job, Benton's failure to so credit them was improper, even though they never informed Benton of this fact (Rep. Tr., p. 59, ll. 10-17), and although at least one of these payments was by joint check on another job which Benton could not lawfully apply to the Bayview-Cabrillo balance (Edwards vs. Curry, 152 Cal. App. 2d 756), although Truett apparently was not aware of this (Rep. Tr., p. 64, ll. 18-21).

Defendants never contended that the source of any of the payments that Benton received from Roelof was a payment from the United States Government on the Bayview-Cabrillo job and there is not one word of testimony throughout the entire trial as to how much money Roelof received from the United States Government for the Bayview-Cabrillo job or when it was received (except that the "final" payment was in May of 1966) or what was done with it.

For some reason the Trial Court completely disregarded the question raised by defendants (whether Benton was wrong in not crediting the payments from Roelof in the same manner as Roelof secretly intended them to be credited) and instead found that "Benton was aware of the source of funds and should have applied such funds to the bonded jobs and not to other due accounts".

There was no finding as to what "source of funds" the Court was talking about or which particular payments the Court was referring to as "such funds". However, it seems clear from what the Court said prior to this finding that the Court believed that some of the funds that Benton credited to other jobs had their source in the "bonded job" and that Benton was aware of this fact.

In effect, the Trial Court made two findings:

1. An implied finding that the source of some of the payments that Benton received from Roelof was money received from the United States Government in payment of the Bayview-Cabrillo contract.
2. An express finding that Benton was aware of the source of these payments and, nevertheless, credited these payments to "other due accounts".

Appellant proposes to demonstrate conclusively that neither of these findings has any support whatever in the evidence.

Since the Court failed to specify exactly which payments it was referring to, it is necessary to examine all of the payments to determine whether there is any evidence whatever to support either of these findings.

Since there was no direct evidence that any payment found its source in the "bonded job", the first question is whether there is any evidence from which it might be inferred that any of them did.

The only testimony regarding the receipt of any money on the "bonded job" was that of Truett (Rep. Tr. , p. 42, ll. 7-25) that Roelof had been paid off completely and that their "final payment" was "probably around" May of 1966 (the last invoice for paint on the Bayview-Cabrillo job was No. 140456 dated April 7, 1966,

Plaintiff's Exhibit 1).

From this testimony, it might easily be inferred that sometime in May of 1966 Roelof received some money on the "bonded job" and that any payments to Benton in May of 1966 may have come from this source.

There were, in fact, two payments in May of 1966, one of May 16, 1966 in the amount of \$2,000.00 and one on May 20, 1966 for \$3,166.00. However, since the first of these was applied to the "bonded job" (Plaintiff's Exhibit 3) and the second came by joint check from "the Vacation Village People", neither of these could possibly be said to have been wrongfully applied.

Can we infer that any other payments found their source in the "bonded job"?

Since Truett used the word "final" in describing the May payment, it might be inferred that Roelof received some money from the "bonded job" before May of 1966, but when and how much is completely unknown. Equally unknown is what other additional funds Roelof had or received while the job was in progress, as well as what other obligations Roelof had during that time.

It has already been pointed out that all of the payments in category 1 between the December 22, 1965 payment and May 20, 1966 were applied to the "bonded job".

Is there any basis on the testimony at all for an inference that Roelof received any money whatsoever on the "bonded job" on or before December 22, 1965? The answer is clearly NO.

How about the payments after May 20, 1966? If Roelof was paid in full in May of 1966, none of the payments after that date could have found their source

in the "bonded job" either, and this includes all of category 2 payments, except the \$3,166.00 payment of May 20, 1966, the source of which was the "Vacation Village People".

There was, therefore, no basis whatsoever for any inference that any payment whose source was the Bayview-Cabrillo job was credited to any other job.

Turning now to what Benton knew about the source of the funds that it received, there is again no direct evidence that it had any knowledge whatsoever as to the source of the funds that it received.

Is there any basis whatsoever for an inference that it had such knowledge?

There is not one word of testimony that anyone told Benton anything at all that might have given it the slightest reason to suspect that the source of any of the funds that it received was from the "bonded job".

The only thing that Benton did know was that Roelof had a Government contract, that Roelof was getting behind and that it did occasionally receive some money. There is no testimony that Benton was told or knew that Roelof was getting progress payments of some kind (if it, in fact, was) from the "bonded job" and nothing to cause Benton to suspect that such was the case, in fact, quite the contrary.

Benton received no payments whatever between February 18, 1966 and April 15, 1966, and during this time, and for some time previous, all of the charges were for the Bayview-Cabrillo job. This could easily have led Benton to suppose that Roelof was not getting any progress payments, that the payments it had previously received came from other jobs, and that it would be paid for Bayview-Cabrillo when the job was complete and Roelof received payment from the Government.

Additionally, the payments that Benton received in October and November of 1965 were the exact amount of the September billing, December's payment was in the exact amount of the October billing and the January payment was in the exact amount of the November billing (see Plaintiff's Exhibit 2 and Defendant's Exhibit G), which would certainly have led Benton to believe that this was how Roelof expected these payments to be credited (which is exactly what Roelof did intend).

Is it these payments which the Trial Court considered to have been wrongfully applied? If so, there would seem to be no basis upon which Benton could possibly have suspected this at the time that it received them. If not, then what payments were wrongfully applied? Certainly not the ones received after Roelof had been "completely paid off". Yet all of the other payments were credited to the "bonded job".

It would seem conclusive that not only was the Trial Court clearly in error but that there was no evidence whatsoever to support the Trial Court's findings (either express or implied) and that the judgment must be reversed, Controller of California vs. Lockwood, 193 F.2d 169 at 172, James Julian Inc. vs. President & Commissioners of Town of Elkton, 341 F.2d 205 at 209, and Los Angeles Trust Deed & Mortgage Exchange vs. S. E. C., 264 F.2d 199 at 208.

This brings us to the question of whether there is any basis at all for any judgment other than one for the Use plaintiff as prayed for.

The two other grounds for deciding the case in defendant's favor, which the Trial Court discussed (but did not decide), were:



1. Whether Roelof's uncommunicated intent that certain payments were to be credited to the Bayview-Cabrillo job (even though one of them was by joint check from the "Vacation Village People") was binding on Use plaintiff?

It is respectfully submitted that it was not and that, as Use plaintiff contended, it was free to apply the payments as it did. Standard Surety & Casualty Co. vs. U. S. for Use and Benefit of Campbell, 154 F. 2d 335 at 337 and California Civil Code, Section 1479.

2. Whether the taking of the note presumptively caused injury to the bonding company?

This question has already been answered in the negative, U. S. Fidelity & Guaranty Co. vs. U. S. for Use of Griscom-Spencer Co., 178 F. 692 at 694.

Therefore, it is respectfully submitted that the judgment should be reversed with instructions to enter judgment for Use plaintiff as prayed for.

Respectfully submitted,

/s/ DAVID S. FOLSOM

Attorney for Plaintiff and Appellant.

## CERTIFICATION

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ DAVID S. FOLSOM



**United States Court of Appeals**  
**FOR THE NINTH CIRCUIT**

THE UNITED STATES OF AMERICA,  
For the Use and Benefit of  
C. H. BENTON, INC., a California  
corporation,

Plaintiff and Appellant,

vs.

ROELOF CONSTRUCTION COMPANY,  
doing business as TRUETT PAINTING  
COMPANY; and FIDELITY AND CASUALTY  
COMPANY OF NEW YORK,

Defendants and Appellees.

On Appeal From the United States District Court  
For the Southern District of California

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**BRIEF OF APPELLEES**

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UNITED STATES COURT OF APPEALS  
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BRIEF OF APPELLEES

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JURISDICTIONAL STATEMENT

This is an appeal from the judgment entered on October 9, 1967 by the United States District Court for the Southern District of California. Said action was predicated upon the Miller Act (40 U. S. C. 270b (b) ).

STATEMENT OF THE CASE

This was a suit brought by the Use Plaintiff against Defendant Roelof and Roelof's bonding company, namely Defendant Fidelity, for painting materials furnished Defendant Roelof for the painting of some United States Government buildings (Bayview-Cabrillo housing). This was a bonded job, the bond having been

furnished by Defendant Fidelity. Use Plaintiff Benton had been furnishing for some one and a half to two years materials on a number of jobs, some of which were bonded and some of which were not (Rep. Tr. , p. 14, ll. 3 through 6, and p. 36, ll. 2 through 13). Said account between Use Plaintiff and Defendant Roelof reflected in one manner or another Use Plaintiff supplying to Defendant Roelof the sum of \$31,441.72 worth of paint for the Bayview-Cabrillo housing project.

Use Plaintiff claims that there is still due and owing the sum of \$4,983.09 on the Bayview-Cabrillo job but Defendant Roelof's contention is that there is presently nothing due and owing on said Bayview-Cabrillo housing project, that Defendant Roelof has paid these amounts in full as was the usual course of business between Use Plaintiff and Defendant Roelof, and therefore, said job was fully paid.

#### FACTS OF THIS CASE

Use Plaintiff as a supplier of paints, and Defendant Roelof, as a painting contractor, did business with each other and in fact had an open account between them for some one and a half to two year period prior to June of 1966 (Rep. Tr. , p. 14, ll. 1 through 6, and Rep. Tr. , p. 36, ll. 2 through 13). These materials were furnished by Use Plaintiff to Defendant Roelof for work done by Defendant Roelof on a number of jobs, some of which were bonded and some of which were not. According to Use Plaintiff, this account was kept current until some time during the course of the Bayview-Cabrillo job (Rep. Tr. , p. 6, ll. 14 through 24), and thereafter, Use Plaintiff commenced writing in his general ledger the particular jobs for each charge and each credit (Rep. Tr. , p. 6, ll. 9 through 12). Use Plaintiff would always, of course, accompany any

materials sold by them to the Defendant Roelof with invoices which would show the name of the jobs and the place of deliveries as set forth in Defendants' Exhibits K and L. Use Plaintiff had, during the course of its dealings with Defendant Roelof, sent letters to one or two other job owners requesting in the future joint checks made payable to Use Plaintiff and Defendant Roelof (Rep. Tr., p. 26, ll. 5 through 9).

Defendant Roelof, in maintaining its books and records with respect to its account with Use Plaintiff, would as a normal practice upon receipt of a statement, check the invoices against the statement and see that they were correct and the balance owing was in fact correct, and then make a tender of a specific amount, correlating it with the amount due on the old balance first, to the Use Plaintiff. The Defendant Roelof would then retire the old invoices into a particular job file (Rep. Tr., p. 36, ll. 14 through 23). Use Plaintiff in addition to rendering statements to Defendant Roelof as an open account, would from time to time render statements to Defendant Roelof on specific jobs (Defts. Exs. I and J). This is further substantiated by Defendants' Exhibits E, F, G, H, I, J, K, and L.

It is established that between the dates April 30, 1965 and April 5, 1966, Use Plaintiff furnished to Defendant Roelof paint for the use on Bayview-Cabrillo jobs (Pre-Trial Stipulation and Order, paragraph III, subparagraph C). The last statement sent by Use Plaintiff covering purchases made by Defendant Roelof on the Bayview-Cabrillo job was in the first part of May 1966 (Rep. Tr., p. 9, ll. 1 through 4).

On June 22, 1966 and June 23, 1966, an attempt was made between the Use

Plaintiff and Defendant Roelof to resolve the account between the two. A meeting took place between the representatives of the Use Plaintiff and Defendant Roelof and there was then in progress a job known as the Hanalei job wherein Defendant Roelof was performing certain painting work, the Use Plaintiff having theretofore furnished to the Defendant Roelof painting materials on that job. This was a non-bonded job, but Use Plaintiff still retained its lien rights on said job because Defendant Roelof had not finished its work as of that date on said job.

According to Use Plaintiff's records, there was no material furnished on the Hanalei job after June 20, 1966 (Rep. Tr. , p. 84, ll. 5 through 9). At the meeting of June 22 and/or 23, 1966, Defendant Roelof requested of Use Plaintiff a lien release on the Hanalei job. Use Plaintiff refused to execute said lien release unless the Defendant Roelof executed a promissory note (Defts. Ex. A), pay some cash, and make two assignments of moneys due on two other of Defendant Roelof's jobs to which Use Plaintiff had furnished materials (Defts. Exs. B and C; Rep. Tr. , p. 13, ll. 2 through 17). Defendant Roelof in fact did execute a promissory note (Defts. Ex. A), the two assignments (Defts. Exs. B and C), paid some cash, and Use Plaintiff executed a release on the Hanalei job (Defts. Ex. D). The note, together with the two assignments and the cash, approximated the amount then due and owing from the Defendant Roelof to the Use Plaintiff.

At that meeting Use Plaintiff contends that it gave to the Defendant Roelof orally the information set forth in Plaintiff's Exhibit 4 which is a recap of the account due and owing between the parties at that time, setting forth therein which jobs the note would cover and in fact which jobs the two assignments would



cover (Rep. Tr., p. 10, ll. 1 through 6). Defendant Roelof denied ever having been advised by the Use Plaintiff of such a breakdown (Rep. Tr., p. 33, l. 25, and p. 34, ll. 1 through 7).

Thereafter, Use Plaintiff received from the Defendant Roelof interest payments and principal payments on said note for the period August 1, 1966 through January of 1967 (Rep. Tr., p. 23, ll. 21 through 25, and page 24, ll. 1 through 15), as well as substantial cash payments as a result of the two assignments (Defts. Exs. B and C). Thereafter, the Complaint in this matter was filed on March 28, 1967 wherein Use Plaintiff sought to recover the sum of \$4,983.09 together with interest thereon at the rate of 7% per annum from April 5, 1966, alleging that these moneys were due and owing on the Bayview-Cabrillo bonded job for materials furnished between August 30, 1965 and April 5, 1966, and seeking relief against Defendant Roelof as well as Defendant Fidelity on said bond.

On April 18, 1967, the Defendant Roelof answered said Complaint admitting that during the period of August 30, 1965 through April 5, 1966 Use Plaintiff supplied to the Defendant Roelof paint in the reasonable value of \$31,441.72 on the bonded job known as Bayview-Cabrillo, but denied that there was any sum then due and owing on that job by the Defendant Roelof to the Use Plaintiff. Thereafter, on May 3, 1967, Defendant Fidelity filed a similar answer to that of Defendant Roelof.

On September 15, 1967, the matter went to trial and the District Court entered its judgment on October 9, 1967.

This appeal followed.

### SUMMARY OF ARGUMENT

We have here a course of dealings between the Use Plaintiff and the Defendant Roelof which commenced in very early 1965. Both parties testified that this was in effect an open book account, however, there were instances wherein Use Plaintiff specifically billed by invoice and/or statement naming a particular job. It is also uncontradicted that in either one or two instances Use Plaintiff sent letters directly to job owners requesting that all future checks be joint checks between Use Plaintiff and Defendant Roelof so as to insure payments to Use Plaintiff for materials supplied. Further, it is uncontradicted that the invoices and/or statements submitted by Use Plaintiff to Defendant Roelof would generally set forth the name of the given location and job where the materials were to be delivered and in specified dollar amounts. Further, it would follow from Defendant Roelof's testimony by Truett, which is the only logical explanation of the nature of the relationship between the parties, that Use Plaintiff was aware, because of the amounts tendered to them by the Defendant Roelof, of the specific jobs, i.e., the source of funds, that is usually well-established in the industry (Rep. Tr., p. 36, ll. 17 through 23). This is further substantiated by the fact that Use Plaintiff was required from time to time to execute releases on jobs wherein Defendant Roelof had or was performing work (Plf. Ex. 7 dated May 5, 1966). In addition thereto, Defendant Roelof had, over a period of some two years, paid to the Use Plaintiff specific sums of money as called for by the way Defendant Roelof would retire the old invoices and put them in the job file (Defts. Exs. E through L, respectively).

Therefore, it is quite apparent that Use Plaintiff, over a considerable period of time prior to and after the completion of the bonded job, applied moneys received from Defendant Roelof to the oldest due account regardless of the source. This is abundantly clear from the record.

In this connection, Use Plaintiff was aware that the bonded job Bayview-Cabrillo was completed by Defendant Roelof in April of 1966 as reflected by their own books and records wherein the last purchase made by Defendant Roelof was in April of 1966 (Rep. Tr. , p. 9, ll. 1 through 4), and they were further aware that the Hanalei job which was not bonded was in progress and Defendant Roelof was doing work on said job during the month of June 1966 when Use Plaintiff testified that he specifically talked to the general contractor on said job, namely Mr. Cory. The Use Plaintiff contends that by reason of Section 1479 of the California Civil Code it was entitled to credit the money it received in any manner it saw fit. This is just not so. The cases hold that in a Miller Act suit Federal law will apply, and in this connection the Federal cases hold that if the creditor knows or has reason to believe that the moneys paid him are from a particular bonded job, he has the duty to apply the funds so received from the debtor upon that account. See United States for the Use of Briggs v. Grubb, 358 F.2d 508, 513 (Ninth Circuit, 1966); St. Paul Fire and Marine Insurance Company v. United States for the Use of Dakota Electric Supply Co., 302 F.2d 22 (Eighth Circuit, 1962).

The account between the Use Plaintiff and Defendant Roelof was resolved, as the evidence discloses, to the satisfaction of Use Plaintiff on June 22 and June 23, 1966. It was not merely an extension of credit, but rather substantially all of the

open book account was taken care of in one manner or another. The uncontradicted evidence discloses that on June 22 and/or June 23, 1966 that said open account between the parties was resolved by the Defendant Roelof assigning to the Use Plaintiff sums then due and owing the Use Plaintiff in the amounts of \$1,706.23 and \$3,300.00, plus paying to the Use Plaintiff some cash, and in addition to which the Defendant Roelof issued in favor of the Use Plaintiff its promissory note for the sum of \$5,736.98. It is further conceded and uncontradicted by the evidence that the amount of the promissory note included more than the amounts then due and owing on the Bayview-Cabrillo (bonded) jobs. It is further undisputed that at the time of resolving said account there were moneys due and owing on the Hanalei job.

Further, the Defendant Roelof, according to its books and records, a portion of which are in evidence as Defendants' Exhibits E through L, respectively, stated that it had paid off in full the Bayview-Cabrillo job in May or June of 1966.

There would seem to be no other logical conclusion from the facts as presented in this case that what really took place on or about June 22 and/or 23, 1966, at the time the account was resolved between the parties, was that the promissory note (Defts. Ex. A) covered the amounts due and owing on the Hanalei job and the two assignments (Defts. Exs. B and C), plus the cash given to Use Plaintiff, paid off the balance of the account. This would seem to be clearly the case and unquestionably the only logical inference drawn from the testimony of Mr. Charles Benton, one of the owners of the Use Plaintiff, when he stated on or about June 22, 1966 he contacted Mr. Cory, the general contractor on the Hanalei job,

and requested joint checks, which request was denied by Mr. Cory; and further, he requested assistance in paying off the amounts then due and owing the Use Plaintiff by the Defendant Roelof on the Hanalei job, to which Mr. Cory gave certain assurances to Mr. Benton. This testimony is uncontradicted. Further, and much more logical, Mr. William Benton, also one of the owners of the Use Plaintiff, testified (Rep. Tr., p. 72, ll. 18 through 22) that the Use Plaintiff on June 22 and/or 23, 1966 gave up its lien security on the Hanalei job by executing the release dated 6/22/67 (Defts. Ex. D) for and in consideration of defendants executing said promissory note (Defts. Ex. A). How is it logically possible to resolve that testimony with the contention of Use Plaintiff that the promissory note given on or about that time was to cover the Bayview-Cabrillo jobs, and that the two assignments did in fact pay off the Hanalei job. Neither the oral testimony and/or the books and records of both Use Plaintiff and Defendants will support such a contention. It must further be kept in mind that the very purpose of the meeting was for Defendant Roelof to obtain a lien release on the Hanalei job, and Use Plaintiff requested as a condition precedent to issuing the lien release that Defendant Roelof deliver to Use Plaintiff (1) the promissory note (Defts. Ex. A), (2) the two assignments (Defts. Exs. B and C), and (3) cash (Rep. Tr., p. 47, ll. 6 through 10).

The Use Plaintiff claims that it gave Defendant Roelof a recap of Plaintiff's Exhibit 4 which indicated how they were applying the promissory note (Defts. Ex. A) to the account between the parties. Defendant Roelof denied this and stated that it was its understanding that the note was to be applied to the Hanalei job in that it had already paid Use Plaintiff in full for the bonded jobs which had been completed in



April. This I submit is a conflict in the testimony, and the trier of fact chose to believe Defendant Roelof.

By resolving the account between the parties, the Use Plaintiff materially prejudiced the Defendant Fidelity. The Use Plaintiff extended, by the terms of the promissory note (Defts. Ex. A), the period over which Defendant Roelof could retire the account. The Use Plaintiff in fact did receive several payments on said note during the ensuing seven or eight month period following execution of same. It is further uncontradicted that after the execution of the promissory note (Defts. Ex. A) Defendant Roelof paid over to Use Plaintiff considerable sums of money which Use Plaintiff applied to suit its particular purposes at the time, contrary to the established practice as developed between Use Plaintiff and Defendant Roelof. Thus, it would appear that Defendant Fidelity might have protected itself had it been aware of the extension and/or the alleged failure of the Defendant Roelof to have paid for the material used on the bonded jobs.

It is rather apparent what Use Plaintiff is trying to do here, and that is -- after the bonded jobs were paid off and Use Plaintiff had reconciled its account with Defendant Roelof on June 22, 1966 by taking a note (Defts. Ex. A), Use Plaintiff found, some nine months later, that Defendant Roelof had defaulted on its note. Use Plaintiff then decided to take the position that Defendant Roelof had not fully paid off the bonded jobs and brought this action to recover from the Defendant Fidelity on the bond, rather than enforce the terms of the promissory note.

CONCLUSION

For the reasons stated, it is respectfully submitted that the District Court's judgment be affirmed and that this appeal be dismissed.

Respectfully submitted,

/s/ HAROLD F. TEBBETTS

Attorney for Defendants and Appellees.

CERTIFICATION

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ HAROLD F. TEBBETTS





## APPENDIX



## APPENDIX

## TABLE OF EXHIBITS

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	<u>Marked for Identification</u>	<u>Received in Evidence</u>
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Plaintiff's #7 (Copy lien release of Vacation Village) . . . . .	63	89
Defendants' #A (Promissory Note dated 6/23/66) . . . . .	10	67
Defendants' #B (Assignments of moneys on Vacation Village job dated 6/22/66) . .	10	67
Defendants' #C (Assignment dated 6/22/66 for \$1, 100 . . . . .	11	67
Defendants' #D (Release dated 6/22/67) . . . . .	11	67
Defendants' #E (Seven statements of Use Plaintiff) . . . . .	23	67
Defendants' #F (Statement of Use Plaintiff to Defendant) . . . . .	25	67
Defendants' #G (Series of statements 8-65 through 5-66) . . . . .	34	67
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Defendants' #L (Series of invoices) . . . . .	66	67



**United States Court of Appeals**  
**FOR THE NINTH CIRCUIT**

**THE UNITED STATES OF AMERICA**  
**For the Use and Benefit of**  
**C. H. BENTON, INC., a California**  
**Corporation,**

**Plaintiff and Appellant,**

**vs.**

**ROELOF CONSTRUCTION COMPANY,**  
**doing business as TRUETT PAINTING**  
**COMPANY; and FIDELITY AND CASUALTY**  
**COMPANY OF NEW YORK,**

**Defendants and Appellees.**

**On Appeal From the United States District Court**  
**For the Southern District of California**

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**APPELLANT'S REPLY BRIEF**

---

**FILED**

**MAY 23 1968**

**WM B LUCK, CLERK**

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

THE UNITED STATES OF AMERICA,  
For the Use and Benefit of  
C. H. BENTON, INC., a California  
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Plaintiff and Appellant,

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COMPANY; and FIDELITY AND CASUALTY  
COMPANY OF NEW YORK,

Defendants and Appellees.

---

APPELLANT'S REPLY BRIEF

---

SUMMARY OF ARGUMENT

Appellees' brief amounts to no more than a confession of error.

ARGUMENT AND AUTHORITIES

For some unknown reason, appellees, contrary to Rule 18 (3), have chosen to completely ignore appellant's contention on this appeal (that the Trial Court's findings of fact were completely unsupported by any evidence whatsoever) and to instead, advance an unresponsive argument, manufactured entirely out of whole cloth, that the note for \$5, 736. 98 (Defendants' Exhibit A) was given for the Hanalei Hotel job and that, therefore, the cash, plus the payments received as a

result of the two assignments taken contemporaneously with the note, should have been applied to the balance of the account, i. e., the Bayview-Cabrillo job.

This same argument was advanced to the Trial Court (Rep. Tr., p. 17, ll. 4-8 and p. 39, ll. 18-21), however, the Trial Court specifically refused to rule on this point (Memorandum of Decision, p. 2, l. 32 to p. 3, l. 1), and, therefore, there is considerable doubt as to whether this argument merits any answer at all at the appellate level since, after all, this appeal was taken from the Trial Court's Judgment, not from appellees' argument at the trial.

On the other hand, appellant would not want this Court to assume from its failure to answer this argument that "silence gives consent". Therefore, appellant will proceed to answer it.

The principal fault with this argument is that it assumes that Benton's officers were out of their minds-, that they demanded a worthless promissory note in exchange for their perfectly valid lien rights on the Hanalei Hotel. This would have been completely irrational.

The second fault with this argument is that there is no relationship between the balance due on the Hanalei job on the date the note was signed of \$4, 643. 91 (\$4, 675. 46 according to the Trial Court-See Memorandum of Decision, p. 1, ll. 23-26) and the amount of the note, which was for \$5, 736. 98.

The third fault with this argument is that appellee's own evidence fails to support it.

Appellees contend in their brief (p. 9, last 3 lines) that "Defendant Roelof... stated that it was its understanding that the note was to be applied to the Hanalei

Job...".

The Trial Court also indicated (Memorandum of Decision, p. 2, ll. 9-10) that it so understood the testimony of Truett.

What Truett actually said (Rep. Tr. , p. 42, ll. 1-6) was:

"My thinking at that time was the release on the Hanalei Hotel which... according to my books that's all we owed on. Not all but we didn't owe anything on the Cabrillo job, according to my credits on my books at that time, so I had no reason to assume that we were even discussing Cabrillo".

Truett also testified: That he did not know what the note was for (Rep. Tr. , p. 34, ll. 4-10), that there was no discussion with Benton as to what the note was for (Rep. Tr. , p. 50, ll. 5-8) that the assignments were "a part of the condition of getting the lien release" (Rep. Tr. , p. 50, ll. 23-24) that "I know it was all one transaction" (Rep. Tr. , p. 48, ll. 18-19) and that the note was "part of the open account, yes, the balance that we owed them at that time". That it was for the "difference" after the two checks "we assigned to them" (Rep. Tr. , p. 44, ll. 2-23).

The only real conflict between Truett's testimony and appellant's evidence is that whereas Charles Benton and Exhibit 4 (which was confirmed by William Benton - See Rep. Tr. , p. 73, ll. 2-4) specified exactly which accounts were covered by the note Truett was unable to so specify and he assumed that the Bayview-Cabrillo account was paid because that is what he secretly intended.

It has already been pointed out in appellant's opening brief that such secret

intentions were not only not binding on Benton but that it could not lawfully follow them in any event and the point will not be belabored further.

Appellees also contend:

1. That defendant Fidelity and Casualty Company of New York was prejudiced by the extension of time. This contention has already been answered by U. S. Fidelity and Guaranty Co. v. U. S. for the Use of Griscom-Spencer Co., 178 F. 692 at 694, cited in appellant's opening brief.

2. That Benton changed its books and records to conform to its position at the Trial after Roelof defaulted on its note. No evidence is cited in support of this contention because there is none.

Appellees' failure to reply to appellant's contention that the Trial Court's findings are not supported by any evidence whatsoever can only be construed as an admission that there is no answer to this contention and that, accordingly, the judgment should be reversed with instructions to enter judgment for Use plaintiff as prayed for.

Respectfully submitted,

/s/ DAVID S. FOLSOM

Attorney for Plaintiff and Appellant.

## CERTIFICATION

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full comppliance with those rules.

/s/ DAVID S. FOLSOM



IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

DAVID LEE HILL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

APPELLEE'S BRIEF

---

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

---

WM. MATTHEW BYRNE, JR.,  
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ROBERT L. BROSIO,  
Assistant U. S. Attorney,  
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FILED

JUL 1 1968

Attorneys for Appellee,  
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IN THE UNITED STATES COURT OF APPEALS  
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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

DAVID LEE HILL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

APPELLEE'S BRIEF

---

I

JURISDICTIONAL STATEMENT

On September 7, 1967 a one count indictment was returned by the Grand Jury for the Central District of California [C. T. 2]. <sup>1/</sup> The indictment charged that on or about July 6, 1967 the appellant Hill and co-defendant Williams by force, violence, and intimidation took from teller Russell Kerger, \$2,278, belonging to the United States National Bank, Windsor Hills Branch, 4437 West Slauson, Los Angeles, California in violation of Title 18,

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<sup>1/</sup> C. T. refers to Clerk's Transcript of Record.



United States Code, Section 2113(a). Further, that in committing the offense appellant Hill and co-defendant Williams assaulted and put in jeopardy the life of Russell Kerger by the use of a pistol and sawed-off shotgun in violation of Title 18, United States Code, Section 2113(d) [C. T. 2].

On September 11, 1967 appellant Hill appeared with counsel and pled not guilty [C. T. 4].

On September 18, 1967 the case was set for a jury trial on October 17, 1967 [C. T. 8].

The jury was impaneled on October 17, 1967 [C. T. 14]. Trial was held from October 17 through October 19, 1967 [C. T. 14-16].

On October 20, 1967 the appellant Hill and co-defendant Williams were found guilty as charged [C. T. 17-19].

On December 4, 1967 appellant Hill was sentenced to the custody of the Attorney General for 15 years under the provisions of Title 18, United States Code, Section 4208(a)(2) [C. T. 24-25].

Appellant Hill filed a timely notice of appeal on December 7, 1967 [C. T. 28]. The District Court issued an order permitting appeal in forma pauperis on December 7, 1967 [C. T. 29].

The offense occurred in the Central District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Section 2113(a)(d), Title 18, United States Code, Section 3231, and Rule 18 of the Federal Rules of Criminal Procedure. This Court has jurisdiction to entertain this appeal pursuant to Title 28, United States Code, Sections 1291 and 1294



and Rule 37(a) of the Federal Rules of Criminal Procedure.

## II

### STATUTE INVOLVED

The indictment was brought under Title 18, United States Code, Sections 2113(a) and (d) which provides in pertinent part as follows:

"(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association; . . . shall be fined not more than \$5,000 or imprisoned not more than twenty years, or both.

" . . . .

"(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) . . . of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than \$10,000 or imprisoned not more than twenty-five years, or both."



### III

#### STATEMENT OF FACTS

On July 6, 1967, the United States National Bank, Windsor Hills Branch, was robbed of \$2,278 [R. T. 68, 90, 143-144]. <sup>2/</sup> The Bank was on July 6, 1967 a national bank, a member of the Federal Reserve System, and a bank whose deposits were insured by the Federal Deposit Insurance Corporation [R. T. 66].

Laura Thomas and Russell Kerger were tellers at the United States National Bank in July of 1967 [R. T. 67, 90]. Richard Bombard was Operations Officer at the Bank during that period of time [R. T. 143].

At five minutes before 3:00 o'clock on July 6, 1967, Laura Thomas, teller at window number two, observed a male Negro enter the bank through the rear door [R. T. 91-92]. This male Negro was identified in the courtroom as appellant Hill [R. T. 73, 97, 149].

Appellant walked across the lobby and stood in line behind teller window number one. He waved a small blue steel revolver and directed every one to sit down in a chair [R. T. 69, 92]. Thomas turned to Richard Bombard and told him to sit down. Bombard was already seated approximately six feet to the rear of the tellers' cages [R. T. 144-146]. Thomas sat in a chair behind the tellers' windows [R. T. 92].

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<sup>2/</sup> R. T. refers to Reporter's Transcript of Proceedings.





A second male Negro was standing toward the rear of the bank. He was holding a sawed-off shotgun [R. T. 71, 92, 93, 144]. This man was later identified in the courtroom as co-defendant Williams [R. T. 97-98, 149-150]. Williams ordered everyone to lay down on the floor [R. T. 92]. Appellant repeated the command for everyone to lay on the floor [R. T. 69, 92]. Thomas laid down on the floor [R. T. 93]. Bombard crouched at the side of his desk and observed both the appellant and co-defendant Williams during the course of the robbery [R. T. 146-147].

Russell Kerger, who was working at teller window number one, was starting to lay down when appellant ordered that he come over to teller window number four [R. T. 69]. Kerger walked over to the counter where appellant threw him a brown paper bag and ordered that he fill it with currency [R. T. 69]. Kerger opened the cash drawer at window number four but as it was not in use the drawer was empty. Appellant looked in the drawer and stated: "You knew that drawer was empty, didn't you?" [R. T. 70: lines 6-8; 144-145]. Kerger, followed by appellant, proceeded to window number three. Kerger attempted to open the drawer but it was locked. Appellant said: "You knew that cash drawer was locked, didn't you? You know where it is. Let's get it." He waved the pistol at Kerger [R. T. 70, lines 14-17]. Kerger then went to windows number one and two where he obtained \$2,278 in currency [R. T. 70: 151, line 8]. He placed the money in the paper bag. Appellant grabbed the bag from his hand and ordered him to lay on the floor [R. T. 70]. Appellant and co-defendant



Williams fled through the rear door of the bank [R. T. 145].

The appellant presented the defense of alibi. He testified that he and co-defendant Williams were very close friends [R. T. 251, lines 20-21]. Further, that on July 6, 1967, he was with Williams for most of the day. He recalled that at approximately 12:30 Williams and his wife Mary Ann came by his house in a taxicab. He got into the taxi and they proceeded to Williams' mother's house. They stayed at the house watching the television program "The Fugitive" until 2:00. At 2:00 Williams, appellant, and Johnny Lee Williams, co-defendant Williams' brother, left the house to go inquire about Williams' automobile which had been wrecked and was sitting in a gas station at Vernon and San Pedro [R. T. 205, 257]. The three rode the bus to the corner of Vernon and Central where they hitched a ride to the home of William Love. William Love is co-defendant Williams' cousin [R. T. 243]. Love took appellant, Williams, and Johnny Lee Williams to see the car at Vernon and San Pedro. They waited while the car was towed away and returned home at approximately 6:00 to 7:00 [R. T. 240-260]. The story was corroborated by co-defendant Williams [R. T. 199-208]; Mary Ann Williams, the wife of co-defendant Williams [R. T. 219-222]; Bessie Williams, the mother of co-defendant Williams [R. T. 225-229]; Johnny Lee Williams, the brother of co-defendant Williams [R. T. 235-240]; and William Love, the cousin of co-defendant Williams [R. T. 243-248]. The appellant also called Larry Junious and Robert Crawford. In July of 1967 both men worked in the gas station at the corner of



San Pedro and Vernon [R. T. 281, 292-293]. They both recalled a damaged vehicle left in the gas station parking lot [R. T. 282, 293]. Crawford could not recall when the car was at the station or the day it was removed [R. T. 293, lines 18-24]. He did recall that the car was removed on an afternoon between 3:30 to 6:00 [R. T. 295, lines 12-14]. Junious was not positive of the day the car was towed away. He thought it might have been July 6th but could not be sure [R. T. 283, lines 8-16; 290-291]. He recalled that the car was towed away on an afternoon sometime between 3:00 and 6:00 [R. T. 288, lines 12-20].

#### IV

#### ERRORS SPECIFIED BY APPELLANT

The appellant has specified the following points on appeal. 3/

1. The District Court erred in failing to order the United States Attorney to produce all statements, signed or unsigned, made by witness Thomas.

2. The District Court erred in failing to strike the identification testimony of all witnesses who were shown pictures of the appellant where in pictures used were so suggestive as to constitute a violation of due process of law.

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3/ Appellant's Opening Brief, page 16.



ARGUMENT

A.     FAILURE TO MOVE FOR PRODUCTION OF JENCKS ACT STATEMENTS IN THE DISTRICT COURT PRECLUDES CONSIDERATION OF NON-DISCLOSURE ON APPEAL.

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Title 18, United States Code, Section 3500 provides in pertinent part that "after a witness called by the United States has testified on direct examination, the Court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in possession of the United States which relates to the subject matter to which the witness testified." (emphasis added).

The appellee called three witnesses [R. T. 67, 88, 143]. Each of the witnesses was cross-examined by the attorney for appellant [R. T. 73-83; 100-110; 151-173]. The appellant made no motion for production of witnesses' statements under Title 18, United States Code, Section 3500.

The burden was on appellant to invoke the Jencks Act at the proper time and in the proper manner so that the trial court would have an opportunity to rule on his request. The failure of the appellant to raise this issue in the District Court prevents him from arguing non-disclosure on appeal.

Lewis v. United States, 340 F.2d 678  
(8th Cir. 1965);





Ogden v. United States, 303 F.2d 724

(9th Cir. 1962);

United States v. Klinghopper, 285 F.2d 487

(2nd Cir. 1960).

B.      THERE WAS NO DENIAL OF DUE  
PROCESS IN THE IDENTIFICATION  
PROCEDURE.

---

1.      As the Appellant Did Not Move to  
Strike the In Court Testimony of  
Identification Witnesses, He is  
Precluded From Making a Due  
Process Attack on the Identification  
Procedures.
- 

The bank robbery occurred on July 6, 1967 [R. T. 67-68]. Approximately four weeks prior to October 17, 1967, Russell Kerger was shown a group of ten photographs by an Agent of the Federal Bureau of Investigation. The pictures were of ten different male Negroes in their middle twenties. The pictures were shown to Kerger at his office. No suggestion was made as to whether he should pick out any person from the group of pictures. He identified a picture of the appellant [R. T. 79, 86]. He was shown the same group of pictures again on October 16, 1967 [R. T. 81, line 21 to 83, line 5]. That group of pictures is the ten photographs contained in appellee's Exhibit No. 7 and appellant's Exhibit E [R. T. 269, line 22 to 271, line 10]. No suggestion was made concerning who, if any one, he should choose [R. T. 85].



On July 20, 1967 Laura Thomas was shown a spread of seven photographs. The photographs were of seven different male Negroes. They are contained in appellee's Exhibit numbers 6 and 9 [R. T. 271, line 17 to 272, line 4]. The pictures were shown by an Agent of the Federal Bureau of Investigation. He gave no indication that there were pictures of the bank robbers in the spread [R. T. 113, line 2 to 114, line 10; 138]. She picked out two people as the bank robbers [R. T. 113]. On October 16, 1967 Thomas was shown a different group of ten photographs [R. T. 138]. That group contained pictures of ten different male Negroes and is contained in appellee's Exhibit No. 7 and appellant's Exhibit E. The pictures were shown by an Agent of the Federal Bureau of Investigation who made no suggestion as to who she should pick out [R. T. 138].

Richard Bombard was also shown a group of pictures by an Agent of the Federal Bureau of Investigation. He was shown a group of six or seven photographs of different male Negroes between twenty-two and twenty-eight [R. T. 157-159]. He was shown the pictures out of the presence of other bank witnesses [R. T. 160]. He was not told what pictures to pick out [R. T. 159, lines 16-19; 187]. Bombard was shown the ten pictures contained in appellee's Exhibit 7 and appellant's Exhibit E on October 16, 1967 [R. T. 163, lines 21-23; 165-166; 269-271]. No suggestion was made as to who, if anyone, he should identify [R. T. 187]. Bombard's in-Court identification of appellant was made from his recollection of the robbery and not the photographs [R. T. 183,



line 10 to 184, line 4].

Appellant was aware of the entire identification process during the trial of this case in the District Court. At no time during the proceedings did he move either for a judgment of acquittal or to strike the courtroom identification by the bank employees. The failure to object to this evidence should preclude the consideration of his due process argument on appeal.

United States v. Wade, 388 U.S. 218 (1967);

Toland v. United States, 365 F.2d 304

(9th Cir. 1966);

Bouchard v. United States, 344 F.2d 872, 875

(9th Cir. 1965).

2. The Selection and Showing of Photographs to the Identifying Witnesses Did Not Deprive the Appellant of Due Process.

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The methods employed by agents of the Federal Bureau of Investigation in showing the pictures are stated in the above argument. Two groups of pictures were shown. They are identified as appellee's Exhibits 6 and 9, seven photographs, and appellee's Exhibit 7 and appellant's Exhibit E, ten photographs. The pictures are of different male Negroes within the same age group. The pictures and procedures comply with the standards set in Simmons v. United States, \_\_\_ U.S. \_\_\_ (No. 55 Oct. Term, 1967. Decided March 18, 1968). First, it was initially necessary to show the



photographs to identify the robbers. Second, a large number of photographs of different male Negroes were shown in each group. Third, the witnesses were alone when they made their initial identification. and Fourth, there is no evidence that F. B. I. agents suggested who they should pick out.

Finally, each of the witnesses picked appellant out of an in-courtroom line up (See Argument C).

C. AS THE APPELLANT DID NOT MAKE  
A MOTION FOR JUDGMENT OF ACQUIT-  
TAL AT ANY TIME DURING THE  
COURSE OF THE TRIAL, THE QUES-  
TION OF THE SUFFICIENCY OF THE  
EVIDENCE IS NOT OPEN ON APPEAL.

---

Before the appellant can ask this Court to review the judgment of the District Court on the grounds of the sufficiency of the evidence, he must preserve this basis by appropriate motion in the trial Court. Rule 29(a) of the Federal Rules of Criminal Procedure reads in pertinent part as follows:

" . . . The Court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more defenses charged in the indictment . . . after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. . . ."





In the instant case no motion for judgment of acquittal was made either at the close of the Government's case or at the close of all the evidence [R. T. 191, 250, 307].

By failing to interpose his motion in the trial Court appellant has waived his right to appeal on the sufficiency of the evidence.

Hardwick v. United States, 296 F.2d 24

(9th Cir. 1961);

Foster v. United States, 318 F.2d 684

(9th Cir. 1963);

Castro v. United States, 323 F.2d 683

(9th Cir. 1963);

Dawkin v. United States, 324 F.2d 521

(9th Cir. 1963).

The Government is not unmindful of Rule 52(b) of the Federal Rules of Criminal Procedure, and such decisions as Bruno v. United States, 259 F.2d 8 (9th Cir. 1958) and Lucas v. United States, 325 F.2d 867 (9th Cir. 1963) wherein the Court may review the sufficiency of the evidence in the absence of a motion for acquittal to prevent a palpable miscarriage of justice, but feels that no injustice would result here. And in any event, the evidence was sufficient to support the verdict. Prior to the impanelment of the jury all witnesses were excluded from the courtroom [R. T. 6-7; 11-12]. The appellant and co-defendant Williams did not sit at counsel table during the testimony of Government witnesses. They sat in the rear of the courtroom with six other male Negroes



[R. T. 59-60]. After the testimony of each of the three tellers a line-up was held in the courtroom [R. T. 72, 96-97, 149]. The line-up consisted of eight male Negroes. Each of the three bank tellers positively identified appellant as the robber who held the pistol in the bank on July 6, 1967 [R. T. 72, line 23 to 73, line 12; 96, line 21 to 97, line 13; 149, lines 3-22]. Only at this time did appellant move to counsel table [R. T. 150].

Viewing this evidence and all inferences which may reasonably be drawn therefrom in the light most favorable to the Government, the evidence was sufficient to support the verdict of guilty.

Noto v. United States, 367 U.S. 290 (1961);

Byrne v. United States, 327 F.2d 825

(9th Cir. 1964);

Mosco v. United States, 301 F.2d 180

(9th Cir. 1962).

### CONCLUSION

For the reasons set forth hereinabove, the Judgment of conviction should be affirmed.

Respectfully submitted,

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United States Attorney,

ROBERT L. BROSIO,

Assistant U. S. Attorney,

Chief, Criminal Division,

ROGER A. BROWNING,

Assistant U. S. Attorney,

Attorneys for Appellee,

United States of America.



CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Roger A. Browning

ROGER A. BROWNING



IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

WILLIAM KENNETH THOMPSON,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

---

APPELLEE'S BRIEF

---

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

EDWIN L. MILLER, JR.,  
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FILED

MAY 17 1968

WM. B. LUCK, CLERK





IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

WILLIAM KENNETH THOMPSON,

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

WILLIAM KENNETH THOMPSON,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

---

APPELLEE'S BRIEF

I.

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant to be guilty as charged in two counts of a three count indictment, following a non-jury trial [C.T. 2-4, 19].<sup>1/</sup>

The offenses occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Section 3231, and Title 21, United States Code, Section 174. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

---

<sup>1/</sup> "C. T." refers to the Clerk's Transcript of Record.





STATEMENT OF THE CASE

Appellant was charged in two counts of a three-count indictment returned by the Federal Grand Jury for the Southern District of California. The first count alleged that appellant Thompson, William Savidan, and Gerald Van Hook knowingly imported and brought approximately seven grams of heroin, a narcotic drug, into the United States from Mexico, contrary to 21 U.S.C. 173 [C.T. 2].

The second count alleged that appellant, Savidan and Van Hook knowingly concealed, and facilitated the transportation and concealment of, approximately seven grams of heroin, which, as they then and there well knew, had been imported and brought into the United States contrary to law [C.T. 3].

The third count charged defendant Savidan with violation of 18 U. S. C. 4107 [C.T. 4].

Appellant waived the right to trial by jury. His court trial commenced on September 21, 1967, before United States District Judge Raymond E. Plummer [C.T. 19; R.T. 3].<sup>2/</sup>

Appellant's motion to suppress evidence was denied on September 22, 1967, and appellant was found guilty as charged in the first two counts on the same date [R.T. 93, 99].

On November 3, 1967, appellant was sentenced by United States District Judge James M. Carter to the custody of the Attorney General for

2/

"R.T." refers to the Reporter's Transcript.



five years upon each count, to run concurrently. It was recommended that he receive treatment as a narcotics addict. It also was recommended that if appellant was in state custody during the period of confinement, that a state institution be designated as the place of confinement for service of the Federal sentence [C.T. 23].

Thereafter, appellant filed a timely notice of appeal [C.T. 26].

### III.

#### ERROR SPECIFIED

Appellant specifies the following points upon appeal:

1. Alleged unlawful search and seizure.
2. Alleged violation of due process of law in regard to the search of appellant.
3. Alleged error in receiving evidence concerning appellant's activities and intentions.
4. Alleged unconstitutionality of 18 U. S. C. 4251.

### IV.

#### STATEMENT OF THE FACTS

Appellant was a passenger in an automobile which entered the United States from Mexico at San Ysidro, California, at approximately 8:40 p.m. on May 21, 1967, a Sunday [R.T. 5, 17]. Two other persons were in the vehicle [R.T. 6].

A United States Customs inspector talked to the occupants of the vehicle. They declared no merchandise. The inspector noted that they were nervous and that their eyes were pinpointed, so he took them to the



secondary area for a personal search [R.T. 6-7]. Appellant had been convicted of the felony of possession of heroin and was required to register when he crossed the border, but he did not register [R.T. 38-39, 50-51].

The three individuals were personally searched in the secondary area. Appellant had prominent needle marks. The other two also had needle marks on the arms [R.T. 7]. Appellant's clothes were completely removed during the personal search. No contraband was found.<sup>3/</sup> The vehicle was searched, and no contraband was found in the vehicle [R.T. 8, 12].

The inspector was suspicious that appellant might be a narcotics violator, due to needle marks on his arm, the pinpointed appearance of his eyes, and the fact that he appeared to be under the influence [R.T. 12]. The inspector thought that appellant had narcotics concealed in the body cavity [R.T. 15].

Customs Port Investigator Arthur E. Hanson was called to the port of entry. He testified that he believed that the inspector told him that all three individuals had needle marks and appeared to be under the influence of a narcotic [R.T. 28-31]. Hanson also was told that the suspects were nervous. He observed needle marks on the arms of all of the suspects [R.T. 35].

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3/

The Reporter's Transcript actually states that contraband was found during this search in the secondary area [R.T. 12]. Counsel for both parties agreed to stipulate that this is an error.



Appellant was arrested for failure to register shortly after Investigator Hanson arrived at the scene [R.T. 29-30].

Customs officers transported the suspects to the office of Dr. Paul R. Salerno, approximately 16 or 17 miles from the international border [R.T. 16, 20-21, 31]. Dr. Salerno was a physician engaged in the practice of medicine. The officers and suspects arrived at the office at approximately 10:30 p.m. on May 21 [R.T. 16-17].

Dr. Salerno examined all three suspects. He noticed old scarring on appellant's left arm, as well as eight vein puncture marks which appeared to have been made during the past several days [R. T. 17, 21]. He located the contraband in question by examining appellant's rectal area with a lubricated gloved finger. The exhibit was gently extricated from the rectal tract. No bleeding occurred [R. T. 19, 28].

There was no arrest warrant and no search warrant [R. T. 11, 30].

Dr. Salerno testified that a suppository might cause a bowel movement but that suppositories "are not a very reliable method of removing a large foreign object." [R.T. 25].

It was stipulated that a chemist would testify that the exhibit in question contained heroin [R.T. 87].





ARGUMENTA. NO SEARCH WARRANT WAS REQUIRED FOR THE SEARCH  
OF APPELLANT.

This case involves a rectal border search. This Court has repeatedly upheld searches of this nature, conducted without a search warrant,

Blackford v. United States, 247 F.2d 745 (9th Cir. 1957);

Murgia v. United States, 285 F.2d 14 (9th Cir. 1960);

Denton v. United States, 310 F.2d 129 (9th Cir. 1962);

Morgan v. United States, 340 F.2d 125 (9th Cir. 1965);

Rivas v. United States, 368 F.2d 703 (9th Cir. 1966);

Spears v. United States, 370 F.2d 335 (9th Cir. 1967).<sup>4/</sup>

Appellant argues that a search warrant should have been obtained, although the incident occurred on a Sunday [R.T. 17]. In Rivas, *supra*, this Court held that a search warrant need not be obtained for a rectal border search where there is a clear indication that the suspect may be smuggling contraband. A "clear indication" was defined as a "plain suggestion," something less than probable cause and more than mere suspicion.

Rivas, *supra*, at p. 710.

In the Rivas opinion, written by Judge Barnes, the Court stated:

"We believe a previously convicted and registered

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<sup>4/</sup>

At the time of the writing of this brief, another rectal search case is awaiting decision in this Court, Huguez v. United States, No. 21518.



users of narcotics (18 U. S. C. § 1407) , coming across the border under the influence of narcotics , as readily shown by his eyes , disclosing thirty 'recent' needle marks on one arm , and 'recent' needle marks on the other , who acts 'in an extremely nervous manner ,' may be searched , as one reasonably portraying a 'clear indication' he may be smuggling contraband." (at p. 710).

Considering the facts of the instant case , it would be difficult to find a factual situation closer to Rivas than the facts herein. Appellant also was a previously convicted violator , having been convicted of possession of heroin , a narcotics felony [R.T. 50-51]. The agents were aware of this fact before the search at Dr. Salerno's office , as appellant was arrested for failure to register shortly after Investigator Hanson arrived at the port of entry [R.T. 29-30]. The inspector believed that appellant was under the influence [R.T. 12].<sup>5/</sup> Hanson testified that he

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5/

Appellant emphasizes the inspector's statement that he was no more suspicious than "normally" of appellant. This appears to be an exercise in ambiguities , because the inspector also testified:

"Well , no more reason because I kind of thought he had it all the time." [R.T. 15].

Thus "normally" apparently refers to the "normal" situation with nervous narcotics users who appear to be under the influence.



believed that the inspector told him that the suspects appeared to be under the influence of a narcotic [R.T. 31]. Appellant had recent needle marks and was nervous. His eyes were pinpointed, and the pupils were smaller than normal [R.T. 7, 17].

In an attempt to meet the heavy burden of distinguishing Rivas from the instant case, appellant states that the condition of Rivas (under the influence) was "readily shown," and that Rivas was "extremely nervous," while appellant was described as being "nervous."

(Appellant's Opening Brief, p. 23. We omit appellant's reference to testimony stricken from the record).

While it is correct that Dr. Salerno was unable to determine whether appellant was under the influence, the critical question in a claim of violation of the Fourth Amendment involves the state of mind of the officer who directed or conducted the search. The inspector noted appellant's needle marks and the pinpointing of his eyes and concluded that appellant appeared to be under the influence [R.T. 12]. The trial Court held, as a finding of fact, that the inspector "believed that narcotics were concealed on the bodies of the three persons . . . ." [R.T. 90]. The officer should not be held to the educational standards of a physician. If such was the case, no state officer could safely make an arrest for the offense of being under the influence of narcotics, as an expert physician might overrule his good faith belief.

In regard to the distinction between nervousness and extreme



nervousness, this is hardly a likely place to draw the line between the lawful search and the unlawful search. During the hearing in the trial Court, appellant's counsel referred to the nervousness of the suspects in the case and stated:

"I don't think it indicates anything at all." [R.T. 75].

Appellant also attempts to distinguish Rivas because Rivas was not subject to arrest and could leave the scene and dispose of the contraband, whereas appellant was arrested for failure to register. However, appellant overlooks the fact that he had a right to a speedy arraignment and a right to immediate bail.

Appellant contends that the agents had "ample time" to obtain a search warrant in two hours and five minutes on a Sunday night. [Appellant's Opening Brief, pp. 16-17]. There is no support in the record for this extraordinary assertion.

The findings of fact by the trial Judge are highly significant, as he had an opportunity to observe the demeanor of the witnesses. The general rule provides that findings of fact by the trial Judge will not be set aside unless "clearly erroneous." This rule has been applied to Fourth Amendment questions.

Goodman v. United States, 369 F.2d 166, 169 (9th Cir. 1966).

Judge Plummer, the trial Judge, announced various findings of fact, including the following:

(a) "All three of the persons appeared to Inspector Orear to be





- nervous. Their eyes were pinpointed." [R.T. 89].
- (b) "Thereafter Inspector Orear examined the arms of all three persons and all had fresh needle marks. The defendant had fresh needle marks on his left arm." [R.T. 89-90].
- (c) "Inspector Orear believed that narcotics were concealed on the bodies of the three persons and contacted Customs Agents Hanson and Burnett." [R.T. 90, emphasis added].
- (d) "Upon examination a spherical foreign object was palpitated and gently extracted." [R.T. 91, emphasis added].
- (e) "The examination conducted by Dr. Salerno was not painful . . . . Nor does the court believe defendant's testimony that the examination made by Dr. Salerno injured the defendant physically in any manner."
- (f) "The search made in this case was a border search and no search warrant was necessary. Humane procedures were followed and it was made in a manner that did not offend ones sense of decency. The intrusion made during the course of the search was justified by the circumstances and was not conducted in an improper manner. The search was not predicated upon mere chance upon mere suspicion on the part of the Customs officials." [R.T. 91, emphasis added].
- (g) "Before the rectal examination was conducted by Dr. Salerno



the Customs Agents were in possession of the following information:

"First . . . .

"Second . . . .

"Third . . . .

"Fourth, that defendant was a prior violator who knew he was supposed to register and who had not done so;

"Fifth, that Inspector Orear after carefully searching defendant's person, his clothing, and the car in which he had been a passenger, had not located any contraband and believed that it was concealed in some body cavity of the defendant."

[R.T. 92].

Based upon the findings of fact, the trial Judge reached the following conclusions of law:

"(1) The arrest of the defendant for violation of Title 18, United States Code, Section 1407, was a lawful arrest.

"(2) The facts and circumstances known to the customs agents clearly indicated and plainly suggested that the defendant had contraband concealed in a body cavity, and that a search would reveal the contraband. The search conducted by Dr. Salerno was humane, legal, reasonable and did not shock the conscience or offend a sense of justice.

"(3) The search made was a continuing border search with respect to time and distance from the border.

"(4) The United States Government has an absolute right to a border



search. No probable cause is necessary. All that is required is that there be a clear indication that in fact contraband will be found." [R.T. 92-93].

Appellant argues that the agents should have employed a different technique:

"All the agents had to do to assure recovery of the evidence without violating defendant's constitutional rights was to lock the legally arrested defendant in a cell, furnish him with a dry, clean bucket, give him a suppository or not, as they chose, and let nature take its course."

[Appellant's Opening Brief, p. 17].

This Court has rejected this proposition:

"If the officers simply jailed Blackford, his attorney would have sought his release by way of a writ of habeas corpus. If the writ be granted, Blackford would walk out with the heroin."

Blackford, supra, at p. 753.

Dr. Salerno testified that use of suppositories is "not a very reliable method" and that the foreign object might not be removed by a suppository [R.T. 25].

It should be noted that the primary distinction, slight though it may be, between Rivas and the instant case, is the fact that Rivas registered and appellant criminally failed to do so. The evasion of the registration law is more suspicious than the act of registering, as the registrant would tend to case attention upon himself.



B. THE SEARCH OF APPELLANT DID NOT VIOLATE THE DUE  
PROCESS CLAUSE OF THE FIFTH AMENDMENT.

Appellant contends that the search of his rectum was shocking to the conscience and violated due process of law. The law is to the contrary.

Blackford, supra, 247 F.2d 745, 753;

Murgia, supra, 285 F.2d 14, 16;

Denton, supra, 310 F.2d 129, 133;

Rivas, supra, 368 F.2d 703, 708, 711.

C. THE TRIAL COURT'S RULING UPON APPELLANT'S OBJECTION  
TO ONE QUESTION DID NOT CONSTITUTE REVERSIBLE  
ERROR.

When appellant testified in regard to the motion to suppress evidence, the trial Judge asked him to state how the contraband went into his rectum and how he intended to remove it. There was an objection to the first of these questions but not to the second. The objection was overruled [R.T. 61-62]. Appellant contends that the ruling upon the objection constituted error because the questions were immaterial.

The questions were not immaterial, because they related to the issue of the reasonableness of the process of removal of the contraband by the physician. Appellant objected to Dr. Salerno's procedures. If there are superior methods for entering and removing contraband from the rectum, it was important for the trial Court to question appellant concerning alternative





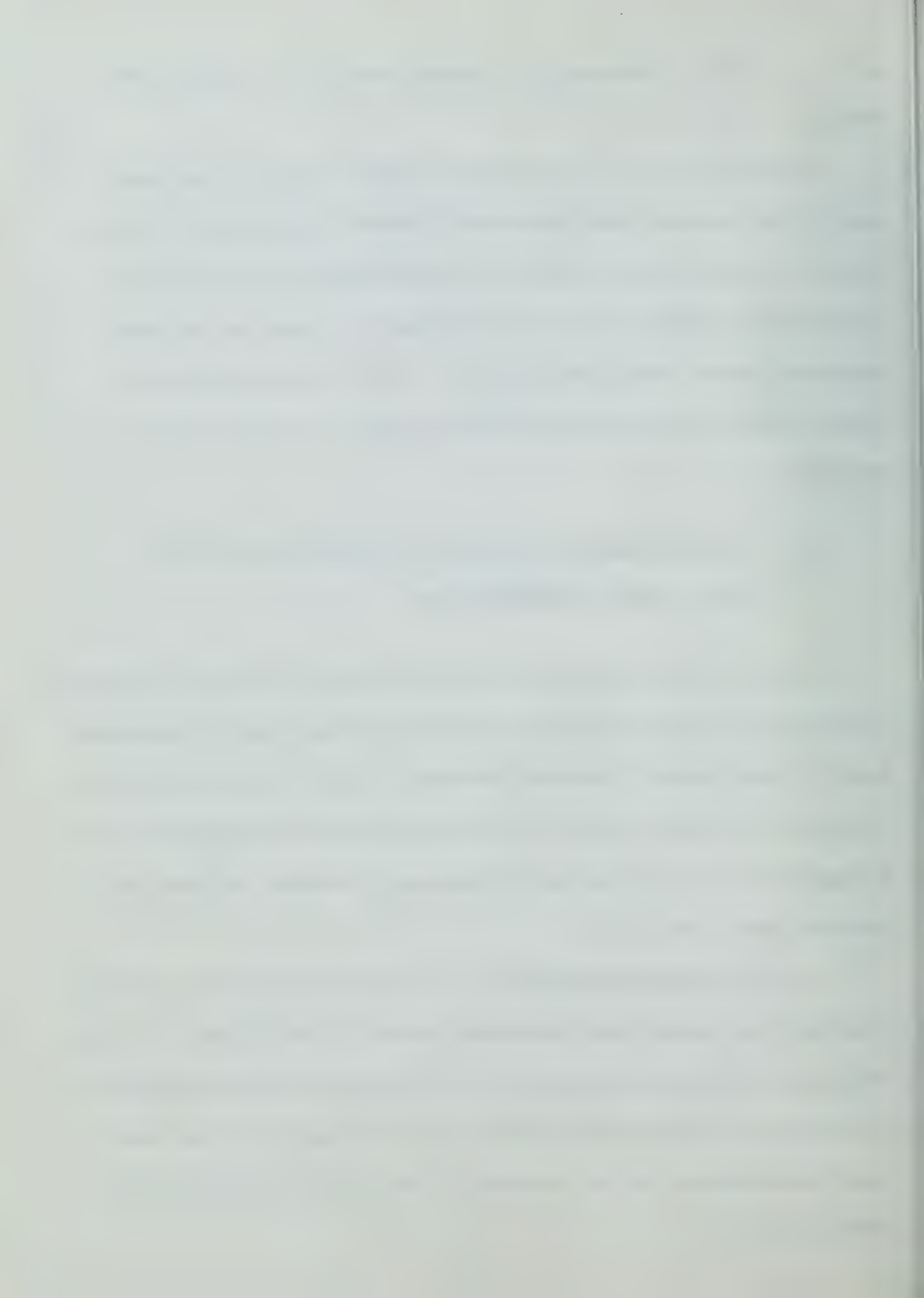
methods, in order to determine the reasonableness of Dr. Salerno's procedures.

Assuming, arguendo, that the ruling upon the objection constituted error, it was harmless error. Appellant's statement that he put the contraband in his rectum was no surprise. Had the question not been asked, the natural assumption would be that the appellant placed the narcotics in his own rectum. The alternative guess would be that someone else placed it there. This possibility would not affect the Court's ruling upon the motion.

D. THE SENTENCING OF APPELLANT DID NOT VIOLATE THE  
UNITED STATES CONSTITUTION.

Appellant contends that his sentencing procedure violated due process of law and equal protection of the laws. He maintains that it is unconstitutional to permit narcotics addiction treatment under 18 United States Code 4251 and the following sections, for persons otherwise eligible who do not have two felony convictions, while denying such treatment to those who have two felony convictions.

It would appear that appellant is not demanding the lighter mandatory "sentence" (six months after commitment) under 18 United State Code 4254, as Congress unquestionably has the power to provide for heavier sentences for recidivists. Consequently, appellant's contention will be discussed upon the assumption that he is referring to the right to narcotics addiction treatment only.



This is not a violation of equal protection. It applies equally to all offenders with two felony convictions.

Furthermore, appellant has not shown that he is ineligible for narcotics addiction treatment under other provisions of law. It is widely recognized that narcotics addiction is primarily a psychiatric problem. Appellant has not shown that he has been denied psychiatric assistance. On the record before this Court, it is certainly questionable that appellant has overcome "the strong presumption of constitutionality due to an Act of Congress. . . ."

United States v. Di Re, 332 U.S. 581, 585 (1948).

VI.

### CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment in the Court below should be affirmed.

Respectfully submitted,

EDWIN L. MILLER, JR.,  
United States Attorney

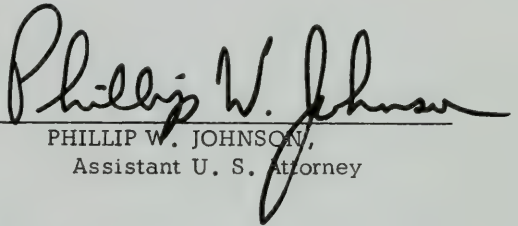
PHILLIP W. JOHNSON,  
Assistant U. S. Attorney

Attorneys for Appellee,  
United States of America.



CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

A handwritten signature in black ink, reading "Phillip W. Johnson", is written over a horizontal line. The signature is fluid and cursive, with a long, sweeping tail on the letter "n".

---

PHILLIP W. JOHNSON,  
Assistant U. S. Attorney









IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

DAVID ERROL KING,	)	
	)	
Appellant,	)	
	)	
v.	)	NO. 22645
	)	
UNITED STATES OF AMERICA,	)	
	)	
Appellee.	)	
_____	)	

APPELLEE'S BRIEF

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

DAVID ERROL KING, )  
 )  
 Appellant, )  
 )  
 v. )  
 )  
 UNITED STATES OF AMERICA, )  
 )  
 Appellee. )  
 )  
 \_\_\_\_\_ )

NO. 22645

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the United States District Court for the Southern District of California, adjudging appellant David Errol King to be guilty of both counts of the indictment following a non-jury trial [C.T. 22].<sup>1</sup>

The offenses occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Section 3231, and Title 21,

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<sup>1</sup> "C.T." refers to Clerk's Transcript.





United States Code, Section 174. Jurisdiction of this court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

## II

### STATEMENT OF THE CASE

Appellant was charged in both counts of the two-count indictment returned by the Federal Grand Jury for the Southern District of California at San Diego, California, on July 19, 1967 [C.T. 2-3].

Count One of the indictment alleged that on or about June 14, 1967, in San Diego County, appellant knowingly imported and brought approximately one and three-fourths ounces of heroin, a narcotic drug, into the United States from Mexico, contrary to Title 21, United States Code, Section 173 [C.T. 2].

Count Two of the indictment alleged that on or about June 14, 1967, in San Diego County, appellant knowingly concealed, and facilitated the transportation and concealment of, approximately one and three-fourths ounces of heroin, a narcotic drug, which, as the defendant then and there well knew, had been imported and brought into the United States contrary to law [C.T. 3].



Non-jury trial of appellant before the Honorable Gus J. Solomon, United States District Judge, resulted in a guilty verdict as to both counts on November 30, 1967 [C.T. 22].

On the same date, appellant was committed to the custody of the Attorney General for a period of six years on each of Counts One and Two to run concurrently [C.T. 21].

Notice of appeal was filed on December 13, 1967 [C.T. 25] (thirteen days later). This on its face does not appear timely.

### III

#### ERROR SPECIFIED

To paraphrase what appears to be appellant's point on the error specified, the sentencing Judge (who was also the trial Judge) utilized hearsay of government counsel and Customs Inspector Ellis in the sentencing of the appellant.

Appellant also apparently complains of sentence without a presentence report. Appellant apparently feels such a procedure resulted in a deprivation of due process, prejudicial to defendant in that defendant was sentenced to two terms of six years concurrent, rather than the minimum five-year terms required by Section 21, United States Code, Section 174.



IV

STATEMENT OF FACTS

Since no issue of guilt is raised by defendant [A.B. 1, 3],<sup>2</sup> the pertinent facts revolve around the sentencing phase of the lower court procedure.

In essence, Government counsel and the Customs Agent presented their opinions of appellant's conduct and criminal activities to the sentencing Judge. The entire procedure was in open court while appellant and his counsel were present.

Attention is directed to the record of the statements of defense and Government counsel, the appellant, Customs Agent Ellis, and the Honorable Judge Solomon [R.T. 76-92].<sup>3</sup> The Judge was obviously seeking information by which he could more completely formulate an opinion of the nature of appellant and his background. This process used by the Court was an attempt by the Court to deal fairly with the appellant by augmenting the information about the appellant received during the course of the trial.

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<sup>2</sup> "A.B." refers to Appellant's Brief.

<sup>3</sup> "R.T." refers to Reporter's Transcript.



ARGUMENTA. THERE WAS NO PREJUDICIAL ERROR COMMITTED BY  
THE DISTRICT COURT IN SENTENCING APPELLANT.

The lower court ordered no presentence report because defense counsel stated to the court that defendant was ready for sentence at that time (immediately after trial and a finding of guilty) [R.T. 90-91]. Therefore, no one had an opportunity to prepare a presentence report. Had such a report been prepared it would undoubtedly have contained unsworn hearsay statements. The inclusion of such statements would not have given rise to constitutional issues. Rule 32(c)(2), Federal Rules of Criminal Procedure. Since all information, hearsay or otherwise, could have been in a presentence report, the error (if any) was not error solely because the statements were made in open court where defendant and his counsel had an opportunity to rebut. It is interesting to note that defendant waived a presentence report (via waiving any delay in the sentencing of defendant), after which the statements, to which he now objects, were made. If appellant wished to present further rebuttal to those statements he could have delayed sentencing.

Assuming there had been a presentence report, the Assistant United States Attorney and Customs Agent Ellis could have given their opinions to the officer preparing the





report. The judge could have then refused to disclose the contents of the report to the defendant. Baker v. United States, 388 F.2d 931 (C.A. 4, 1968); United States v. Weiner, 376 F.2d 42 (C.A. 3, 1967). Had this been the case, however unlikely, in view of Judge Solomon's attempt to be scrupulously fair, it is clear appellant would have been worse off than he is. Yet no constitutional bar to such a procedure exists. It is difficult to find the "gross unfairness" claimed of in the procedure used by the court.

The District Court was not required to order a presentence report. Roddy v. United States, 296 F.2d 9 (C.A. 10, 1961), Rule 32(c), Federal Rules of Criminal Procedure.

The defendant was found guilty of two crimes, each of which carries a minimum punishment of five years and a maximum punishment of twenty years (Title 21, United States Code, Section 174). These terms could have run consecutively for an overall sentence of forty years. Gore v. United States, 357 U.S. 386 (1958). Appellant was sentenced to six years on each count to run concurrently, only one year more than the minimum permissible sentence. Not only was such a sentence permissible, under the circumstances it was lenient in view of the quantity and high quality of the narcotics involved. The Government respectfully submits that this court has the duty to affirm the



sentence. Cf. Russell v. United States, 288 F.2d 52 (C.A. 9, 1961), cert. denied, 371 U.S. 926.

B. SOLICITING OPINIONS OF COUNSEL, BOTH  
DEFENSE AND GOVERNMENT, WAS NOT ERROR  
BY THE DISTRICT COURT.

The court may inquire as to the Government's opinion of the case for purposes of sentencing defendants. Noell v. United States, 183 F.2d 334 (C.A. 9, 1950). The judge is allowed wide discretion in the gathering of information for sentencing. William v. New York, 337 U.S. 241, 69 S.Ct. 1079, 93 L. Ed. 1337 (1949); United States v. Doyle, 348 F.2d 715 (C.A. 2, 1965), cert. denied, 382 U.S. 843; United States v. Fischer, 381 F.2d 509 (C.A. 2, 1967), cert. denied, 390 U.S. 973.

The one Federal case cited by appellant, United States v. Foster, 9 F.R.D. 367, is not on point nor is it relevant. That case did not deal with the sentencing process.



VI

CONCLUSION

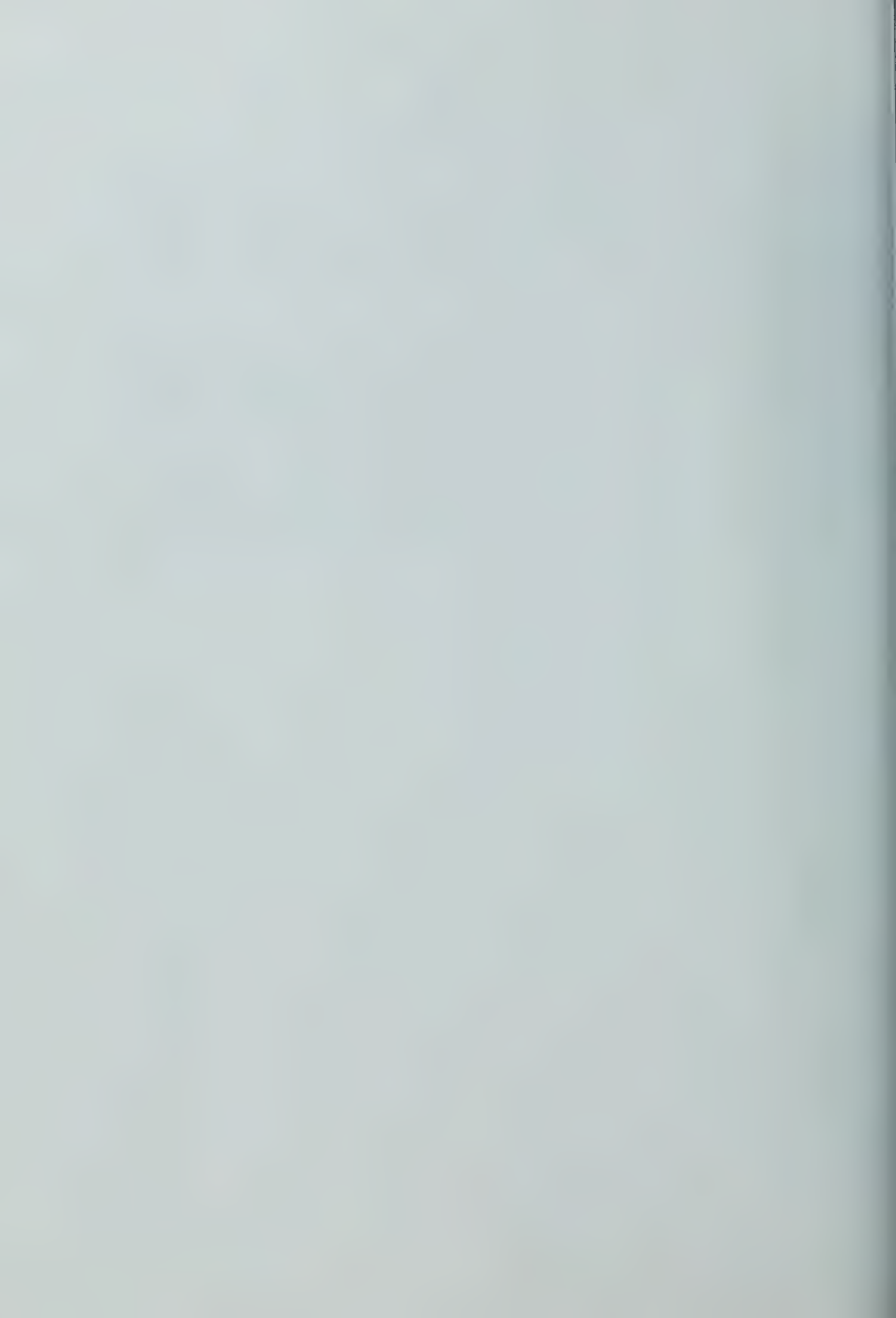
For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

EDWIN L. MILLER, JR.  
United States Attorney

SHELBY R. GOTT  
Assistant U.S. Attorney

Attorneys for Appellee,  
United States of America



UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

AUGUSTINE S. TOVAR, )  
 )  
Petitioner-Appellant, )  
 )  
vs. )  
 )  
PEOPLE OF THE STATE OF )  
CALIFORNIA, )  
 )  
Respondent-Appellee. )

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No. 22648

FEB 24 1969

APPELLEE'S BRIEF

FILED

JAN 29 1969

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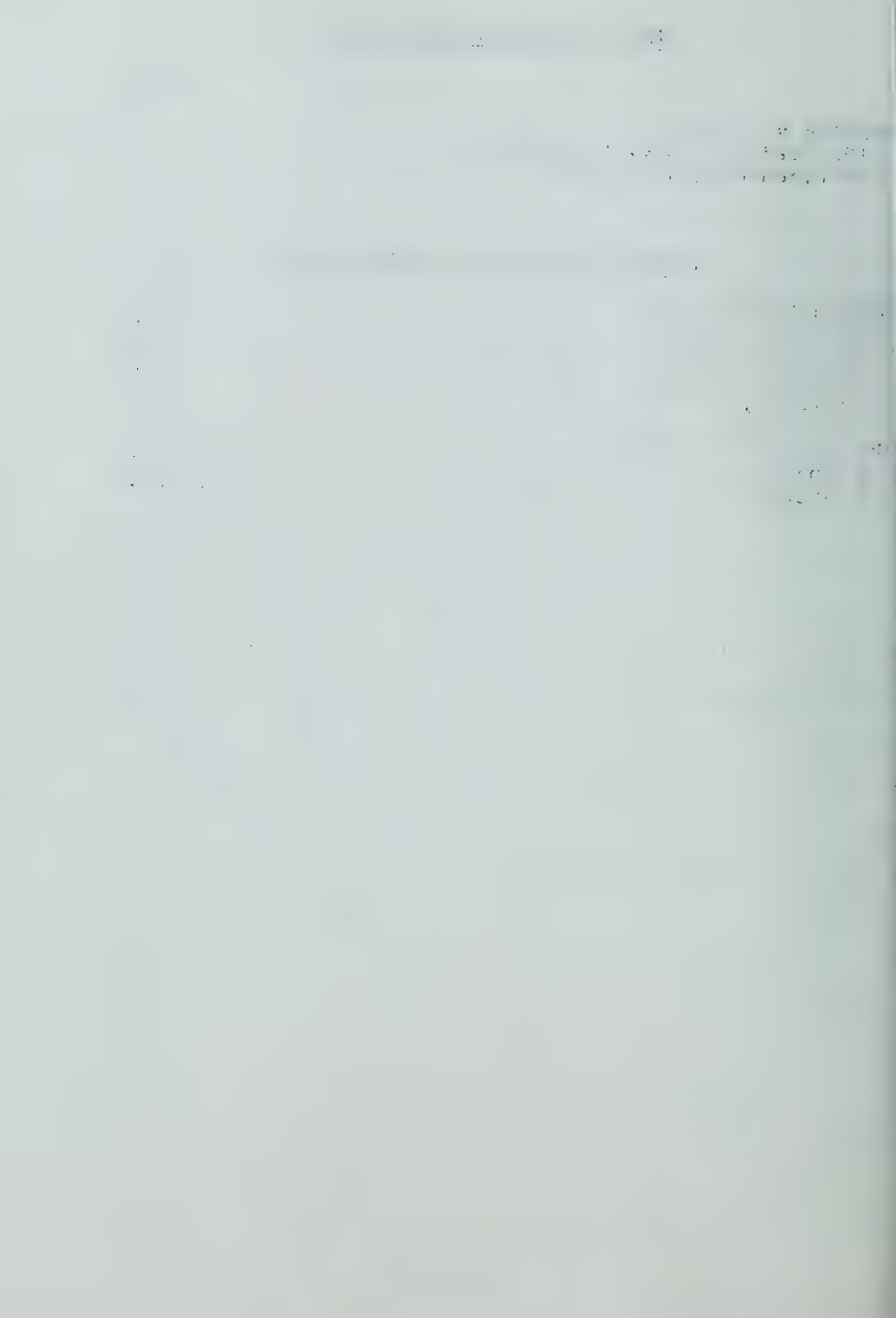
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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AUGUSTINE S. TOVAR,

Petitioner-Appellant,

vs.

No. 22648

PEOPLE OF THE STATE OF  
CALIFORNIA,

Respondent-Appellee.

APPELLEE'S BRIEF

JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's petition for a writ of habeas corpus was conferred by Title 28, United States Code sections 2241, 2242 and 2243. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when a certificate of probable cause has issued.

STATEMENT OF THE CASE

A. Proceedings in the state courts.

Appellant, Augustine S. Tovar, was convicted by the Superior Court of the State of California for the County of Riverside, on his plea of guilty of violating California Penal Code section 4532(b), to wit: escape, without force or violence, and sentenced to state prison for the term prescribed





by law (see Respondent's Return to Order to Show Cause, Exhibit A).

Appellant did not appeal the conviction, but did file petitions for writs of habeas corpus in the Superior Court of the State of California for the County of Marin and in the California Supreme Court (see Petition, p. 5). The petition for writ of habeas corpus filed in the Marin County Superior Court was denied on June 9, 1967, and the petition filed in the California Supreme Court was denied on July 12, 1967. Substantially the same factual and legal issues presented to the District Court were raised in those petitions (see Petition, p. 6).

B. Proceedings in the federal courts.

On November 1, 1967, appellant filed an application for a writ of habeas corpus in the United States District Court for the Northern District of California, challenging the validity of his confinement in state prison on these grounds: (1) That his plea of guilty was induced by a promise of leniency, and (2) That his trial counsel was constitutionally incompetent because he did not know or advise appellant that the offense to which appellant pleaded guilty, i.e., escape without force or violence, had not actually been committed.

The District Court, on November 1, 1967, issued an order to show cause why the writ should not be granted, and on November 30, 1967, respondent filed a return to the order to show cause and points and authorities in opposition to the petition for writ of habeas corpus. Appellant filed a traverse to respondent's return on December 7, 1967.



On January 11, 1968, the District Court denied the petition for writ of habeas corpus, and on February 19, 1968, a certificate of probable cause to appeal in forma pauperis was granted.

### SUMMARY OF APPELLEE'S ARGUMENT

I. Appellant is properly confined in state prison pursuant to a valid order of commitment of the Superior Court of the State of California for the County of Riverside.

II. Appellant was not denied the effective assistance of counsel.

### ARGUMENT

#### I

APPELLANT IS PROPERLY CONFINED IN STATE PRISON PURSUANT TO A VALID ORDER OF COMMITMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF RIVERSIDE.

The District Court rejected appellant's contention that his plea of guilty was induced by a promise of leniency and that his trial counsel was constitutionally incompetent. The court held that the record of the proceedings at which appellant changed his plea from not guilty to guilty convincingly established that appellant's plea was voluntary.

Appellant neither challenges nor controverts the District Court's determination that he voluntarily pleaded guilty to a charge of violating California Penal Code section 2632(b); rather, appellant argues to this Honorable Court that he is improperly imprisoned in state prison because the sentencing court "had no jurisdiction to try, convict, and sentence appellant to the state prison . . . under California

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Penal Code section 4532." (AOB 4-11).

The Superior Court's jurisdiction of the subject matter is readily determined from the language of the charged offense (see Cal.Pen.Code § 4532(b)). And, quite obviously, the Superior Court had jurisdiction of appellant's person at the time he pleaded guilty to the charged crime. See Frisbie v. Collins, 342 U.S. 519 (1952); Ker v. Illinois, 119 U.S. 436 (1886); People v. Garner, 57 Cal.2d 135, 141 (1961). "A court which has jurisdiction of the subject matter and of the defendant, as did the court in the instant case, has the power, upon a defendant's [voluntary] plea of guilty, to enter a judgment unassailable from collateral attack." United States v. Hoyland, 264 F.2d 346, 352-53 (7th Cir. 1959). Accordingly, the crucial determination is whether appellant's plea of guilty was a voluntary plea.

It is axiomatic that a plea of guilty, if induced by promises or threats which deprived the plea of the character of a voluntary act, is void, and a conviction based upon such a plea is open to collateral attack. Machibroda v. United States, 368 U.S. 487, 493 (1962). A voluntary plea of guilty, however, "is itself a conviction" and, like a jury's verdict, is conclusive. Kercheval v. United States, 274 U.S. 220, 223 (1927). Such a plea admits every well-pleaded allegation and constitutes a confession of guilt, leaving the trial court nothing to do except render judgment and sentence. See United States v. Hoyland, supra; Hoover v. United States, 268 F.2d 787, 790 (10th Cir. 1959).

Because his plea of guilty was freely and voluntarily



entered, as evidenced by the record before this Court (see Return to Order to Show Cause, Exhibit D), appellant cannot now assert that he was not guilty of the offense charged. See Hoover v. United States, supra.

## II

APPELLANT WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

Appellant asserts that he was denied the effective assistance of counsel at the trial level of the proceedings which culminated in his confinement in state prison, because his counsel 1) failed to investigate the facts and circumstances surrounding the charged offense, and 2) displayed an open disinterest in appellant's case. This assertion is based upon appellant's belief that at the time he pleaded guilty to the crime of escape, he was really guilty of nothing more than resisting arrest (AOB 12-15).

"To justify a writ of habeas corpus on the ground of incompetency of an attorney an extreme case must be disclosed. [Citations omitted.] Counsel appointed by a court to represent an accused is presumed to be competent, and the burden rests upon the petitioner to prove such incompetency." Maye v. Pescor, 162 F.2d 641, 643 (8th Cir. 1947). Hence, even if we accept as true appellant's averment that his trial counsel advised him to plead guilty to the charge of escape, with the understanding that an agreement had been reached with the district attorney that an additional charge of burglary would be dropped, such advice and representation does not amount to incompetence, and does not vitiate appellant's







plea of guilty. See Harris v. United States, 338 F.2d 75, 80 (9th Cir. 1964).

At the time appellant entered his plea of guilty, California case law construed California Penal Code section 4532(b) to apply to an arrestee's flight, prior to booking, from the toils of the law where a warrant had issued and was outstanding for the arrestee's arrest; the arrestee was a prisoner charged with a felony and in the lawful custody of an officer at the time of his unauthorized departure. People v. Torres, 152 Cal.App.2d 636, 639 (1957). And although the California Supreme Court just recently declared that there must be a formal arrest and booking before the escape statutes come into effect (In re Culver, 69 A.C. 937, 943-44 (1968)), this change in the law does not detract from the effectiveness of appellant's trial counsel's representation. The fact that an attorney's advice to an accused, correct under state law existing at the time the accused was advised to plead guilty, thereafter is controverted by new court decisions, is not "an exceptional circumstance" justifying the conclusion that the accused did not receive the effective assistance of counsel. See Sunal v. Large, 332 U.S. 174, 182 (1947); Warring v. Colpoys, 122 F.2d 642, 645-47 (D.C. Cir. 1941), cert.denied 314 U.S. 678; compare In re Jackson, 61 Cal.2d 500, 505-08 (1964). The crucial issue is still "whether, with all the facts before [an accused], including the advice of competent counsel, the plea [of guilty] was truly voluntary." Martin v. United States, 256 F.2d 345, 349 (5th Cir. 1958), cert.denied 358 U.S. 921. As stated by this Honorable Court in Brubaker



v. Dickson, 310 F.2d 30 (9th Cir. 1962):

"Due process does not require 'errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance.'" Brubaker v. Dickson, supra at 37, citing MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960), modified in 289 F.2d 928 (5th Cir. 1961).

CONCLUSION

Appellant having failed to controvert the ruling of the District Court, it is respectfully submitted that the order of the District Court denying appellant's petition for a writ of habeas corpus should be affirmed.

Dated: January 22, 1969

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Attorneys for Appellee

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

LAWRENCE E. WILSON, Warden,  
California State Prison,  
San Quentin, California,

Appellant,

vs.

WILBERT LEE DAVIS,

Appellee.

No. 22,649 ✓

APPELLANT'S OPENING BRIEF

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FILED

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WM. B. LUCK, CLERK



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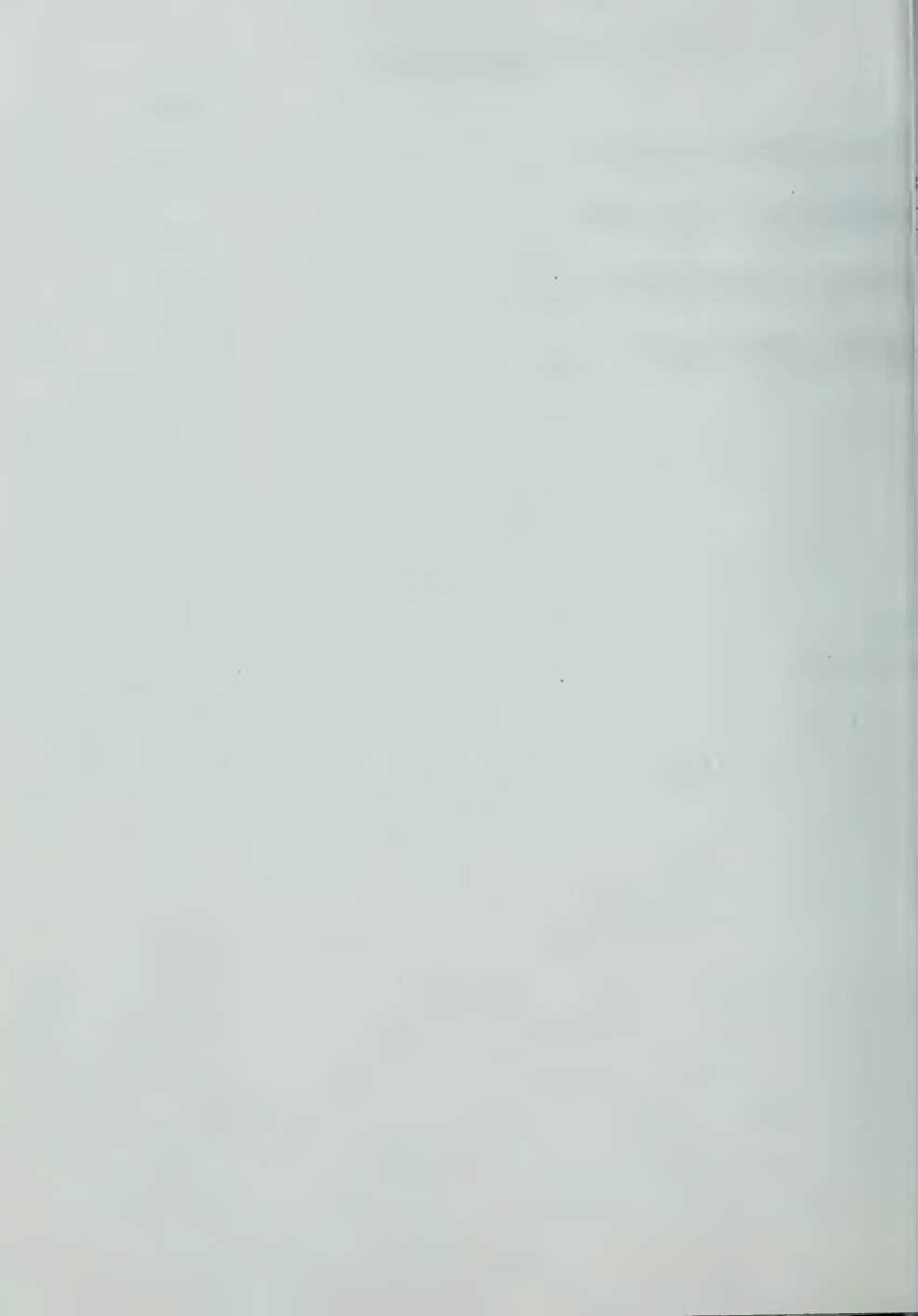
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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

LAWRENCE E. WILSON, Warden,  
California State Prison,  
San Quentin, California,  
  
Appellant,  
  
vs.  
  
WILBERT LEE DAVIS,  
  
Appellee.

No. 22,649

APPELLANT'S OPENING BRIEF

JURISDICTION

The jurisdiction of the United States District Court to issue the writ of habeas corpus was conferred by Title 28, United States Code section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when a certificate of probable cause has issued.

STATEMENT OF THE CASE

This is an appeal by Lawrence E. Wilson, former Warden and Louis S. Nelson, Warden of the California State Prison at San Quentin, California, respondent below and custodian of appellee, Wilbert Lee Davis, from an order of the United States District Court for the Central District of California.



A. Proceedings in the State Courts.

Appellee, Wilbert Lee Davis, was convicted of robbery after trial in the Superior Court of the State of California for the County of Riverside. On December 21, 1965, he was sentenced to the State prison for the term prescribed by law. No appeal from the judgment was taken.

Appellee subsequently filed an application with the California Court of Appeal for the Fourth Appellate District for leave to file late notice of appeal. This application was denied on August 31, 1966. S.B. Misc. No. 50-66.

Appellee's petition for a writ of habeas corpus in the Superior Court of the County of Marin was denied on January 4, 1967. His habeas application to the California Court of appeal was denied on February 24, 1967, and a similar petition to the California Supreme Court was denied on April 26, 1967. In all of these applications, appellee claimed that he had been deprived of his right to appeal from his judgment of conviction.

B. Proceedings in the Federal Courts.

On July 11, 1967, appellee filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California. Case No. 47399 (CT 2-17). An order to show cause was issued by Judge Stanley A. Weigel on the same day (CT 18). Appellant, respondent below, filed a return to the order to show cause on July 17, 1967 (CT 19-27).

On July 21, 1967, Judge Weigel ordered the matter





transferred to the United States District Court for the Central District pursuant to the provisions of Title 28, United States Code section 2241(d) where it was renumbered 67-128-WPG (CT 28-30). On December 19, 1967, Judge William P. Gray of the Central District ordered the matter set for an evidentiary hearing and appointed counsel to represent appellee.

On January 15, 1968, a hearing was held in the United States District Court for the Central District of California and evidence and points and authorities offered on the issue of whether appellee had been wrongfully deprived of his right to appeal from his judgment of conviction in the state court. The court filed its memorandum of decision and order on January 31, 1968. The court found that the failure of trial counsel to file notice of appeal on appellee's behalf deprived him of equal protection of the law. The court ordered that, unless appellee be allowed to file a late notice of appeal and counsel be appointed to represent him on appeal, appellee should be discharged from custody on March 1, 1968 (CT 50-55).

Notice of appeal, application for certificate of probable cause and a motion for stay of execution of judgment pending appeal were filed by appellant on February 29, 1968 (CT 56-57). The court stayed the execution of judgment until March 5, 1968 (CT 58).

Appellant's notice of motion and motion for order of custody pending appeal were filed in this Court on March 5,



1968 (CT 61-62). The judgment of the District Court was ordered temporarily stayed to permit the orderly disposition of appellant's motion. Additional points and authorities in support of the motion were filed by appellant on March 8, 1968. Points and authorities in opposition to the motion were filed by appellee on March 21, 1968. Appellant's response to appellee's opposition to the motion was filed on April 12, 1968. On April 19, 1968, this Court ordered the order of the District Court stayed pending disposition of this appeal.

#### STATEMENT OF THE FACTS

In his petition filed with the United States District Court for the Northern District of California, petitioner alleged that, following his conviction, he intended to appeal. He alleged that he requested counsel to file notice of appeal and that counsel reviewed the record, determined that there was no error at trial, failed to file notice of appeal and failed to notify appellee of his decision. Appellee contends that he was thereby deprived of adequate representation by counsel and that this deprivation constituted a denial of equal protection of the law.

During the course of the evidentiary hearing held in the United States District Court for the Central District of California, appellee testified that after the jury returned its verdict of guilty, he asked the public defender who had represented him how to go about filing an appeal. Appellee related that the public defender told him that an appeal should



be filed after the conviction and that he would file it later. Appellee testified that this was the only conversation he ever had with the public defender concerning an appeal (RT 13).<sup>1/</sup> He also testified that, long after the time for filing notice of appeal had elapsed, he corresponded with the California Court of Appeal for the Fourth Appellate District and the office of the County Clerk of Riverside County and learned that no notice of appeal had ever been filed (RT 14-22).

In response to questioning by the court, appellee testified that during all the time subsequent to his conviction and sentence, it had been his intention to appeal from the conviction (RT 22). Appellee also made reference to his correspondence with the Superior Courts of Riverside and Marin Counties, the California Court of Appeal for the Fourth Appellate District and the California Supreme Court in an effort to file a belated notice of appeal (RT 22-24). Finally, appellee testified that, as far as he had been concerned, the public defender had definitely promised to file notice of appeal on his behalf (RT 28).

In response to questions concerning the possible merits of an appeal, appellee testified that the testimony of prosecution witnesses was conflicting, that his identification as the robber by the victim of the robbery was

---

1. The reporter's transcript of the evidentiary hearing held on January 15, 1968 before the United States District Court for the Central District of California is hereinafter designated "RT."



inconclusive and that he objected to the manner in which the district attorney questioned witnesses for the prosecution (RT 32-34).

Mr. James Windham of the Office of the Public Defender of Riverside County testified that, following the verdict of guilty, appellee had asked him about taking an appeal. Windham advised appellee that the time for filing notice of appeal was within ten days after the imposition of sentence. Windham also told appellee that he would review the case and, if there was any possible basis for an appeal, he would file notice of appeal: otherwise, he would not (RT 37).

In discussing the factors upon which he based his opinion that an appeal was totally without merit, Windham testified that the case was basically factual in nature and that he felt there was no error in the course of the trial (RT 38). Windham testified that, following the verdict, appellee had simply asked him about the possibility of an appeal. Windham was under the impression that he had not been requested to file an appeal but that it had been left to him to determine whether there was error upon which an appeal might be based (RT 41-42). Windham did not notify appellee after reaching the decision not to file an appeal had been reached (RT 42).

Summarizing its view of the facts established by the evidence the district court noted that there was overwhelming proof that no appeal had been filed and that appellee





had not knowingly and intentionally waived his right to appeal. The court also noted that appellee may not have insisted to his attorney that he wanted an appeal filed and that the attorney felt that the matter was "pretty much in his hands." (RT 47). Finally, the court observed that with respect to any indication that the appeal was meritorious, there had been "a very limited showing" and that the court was in no position to adjudge the possible merits of the appeal (RT 48).

In its order filed January 31, 1968, the court found that promptly after the verdict was received, appellee expressed his desire to appeal to the public defender who responded that he would study the matter and would file an appeal if he could find any reasonable basis for doing so (Order, p. 1). The court also found that the public defender did give the matter consideration but concluded that an appeal was not warranted and did not file notice nor advise appellee of his decision (Opinion, p. 2). The court also noted that the public defender could not recall what issues might have been presented as possible errors on appeal but that appellee had recited several alleged conflicts in testimony and errors in the admission of evidence, the merits of which the court found impossible to evaluate (Opinion, p. 5).

The District Court found that, under California law, the initial appeal from a criminal conviction is granted as a matter of right and that, if appellee had been financially able to employ counsel, he would have had no trouble in having



notice of appeal filed and having been accorded a judicial determination of the merits of his appeal. The court concluded that the failure of the public defender to file notice of appeal deprived appellee of equal protection of law and ordered the issuance of the writ (Opinion, pp. 3, 5).

#### APPELLANT'S CONTENTIONS

1. The District Court erred in holding that the failure of appointed counsel to perfect appellee's right to appeal deprived him of a federally protected constitutional right.

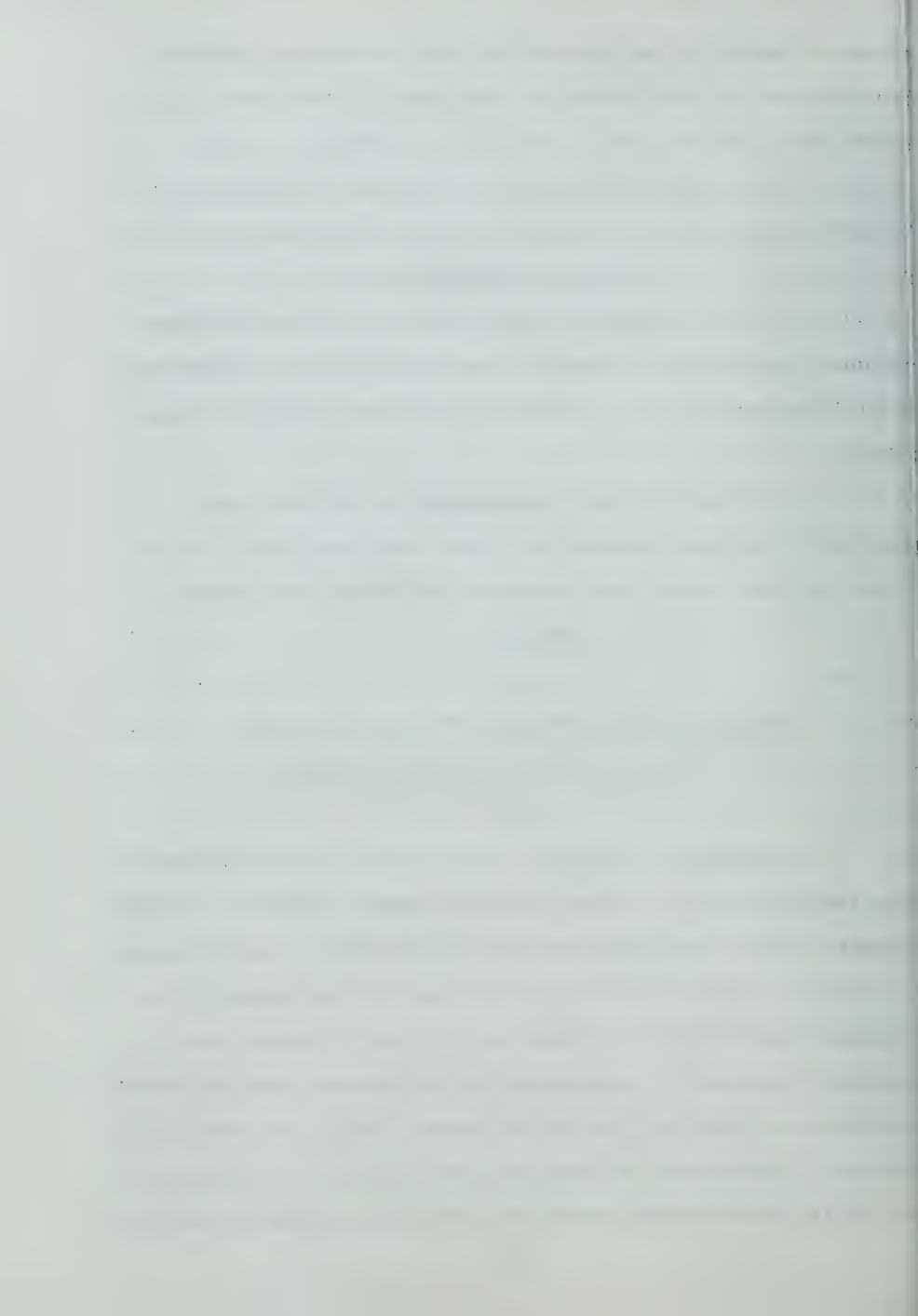
2. The district court erred in holding that appellee's failure to establish that there was merit to his appeal was not a bar to an order to reinstate the appeal.

#### ARGUMENT

##### I

THE DISTRICT COURT ERRED IN HOLDING THAT  
THE FAILURE OF APPOINTED COUNSEL TO PER-  
FECT APPELLEE'S RIGHT TO APPEAL DEPRIVED  
HIM OF A FEDERALLY PROTECTED CONSTITUTIONAL  
RIGHT.

Noting that the first appeal from a criminal conviction is granted as a matter of right under California law and assuming that if appellee had been financially able to employ counsel, he would have been able to perfect his appeal, the District Court below held that the failure of appellee's appointed counsel to perfect his appeal denied appellee equal protection of the law. While an appeal from a criminal conviction in California is available as a matter of right upon the filing of a timely notice of appeal, the premise that the



result in this case would have been any different had counsel been retained instead of appointed is without support in the record.

In its order, the District Court noted that promptly after the verdict was received, appellee expressed a desire to appeal to the public defender who had represented him at trial. The public defender responded that he would study the matter and would institute an appeal if he could find any reasonable basis for doing so. The public defender did study the possibility of an appeal but concluded that an appeal was not warranted and neither filed notice of appeal nor advised appellee of his decision.

While it is not clear whether appellee ever definitely requested his counsel to file notice of appeal the comments of the District Court during the course of the hearing indicate that he did not (RT 47). Although appellee did testify that it was his impression that counsel had promised to file an appeal, the comments of the District Court judge during the course of the evidentiary hearing indicate that there was most likely a misunderstanding between counsel and appellee. It is apparent that appointed counsel was of the impression that the decision of whether to file an appeal had been left in his hands by his client, appellee. Appellant submits that the facts stated by the district court clearly indicate the court rejected any finding of a definite promise by counsel.

Assuming that appellee's counsel had been retained



rather than appointed, it is difficult to imagine how the actions of counsel would have been different as a result. Though indigent, appellee was afforded counsel who, following conviction, discussed the possibility of an appeal with his client and informed his client that, if there was any merit to his appeal, he would file notice of appeal. His client apparently acquiesced in this suggestion. Acting upon this apparent acquiescence, and in the absence of any indication to the contrary, counsel studied the record, made his decision and acted.

Appellant submits that there is no factual basis for concluding that retained counsel would have produced a different result. As observed by Judge Friendly in United States v. Follette, 358 F.2d 922 (2nd Cir. 1966), "Occasional shortcomings of counsel are a danger confronting all, . . . and those able to retain counsel may forfeit the right to appeal through such oversight or ineptitude as fully as those who are not. (Citations.)" Nor is there any evidence of action which may be attributed to the State to justify a determination that state action deprived appellee of the equal protection of the law.<sup>2/</sup>

Nor was appellee denied adequate representation

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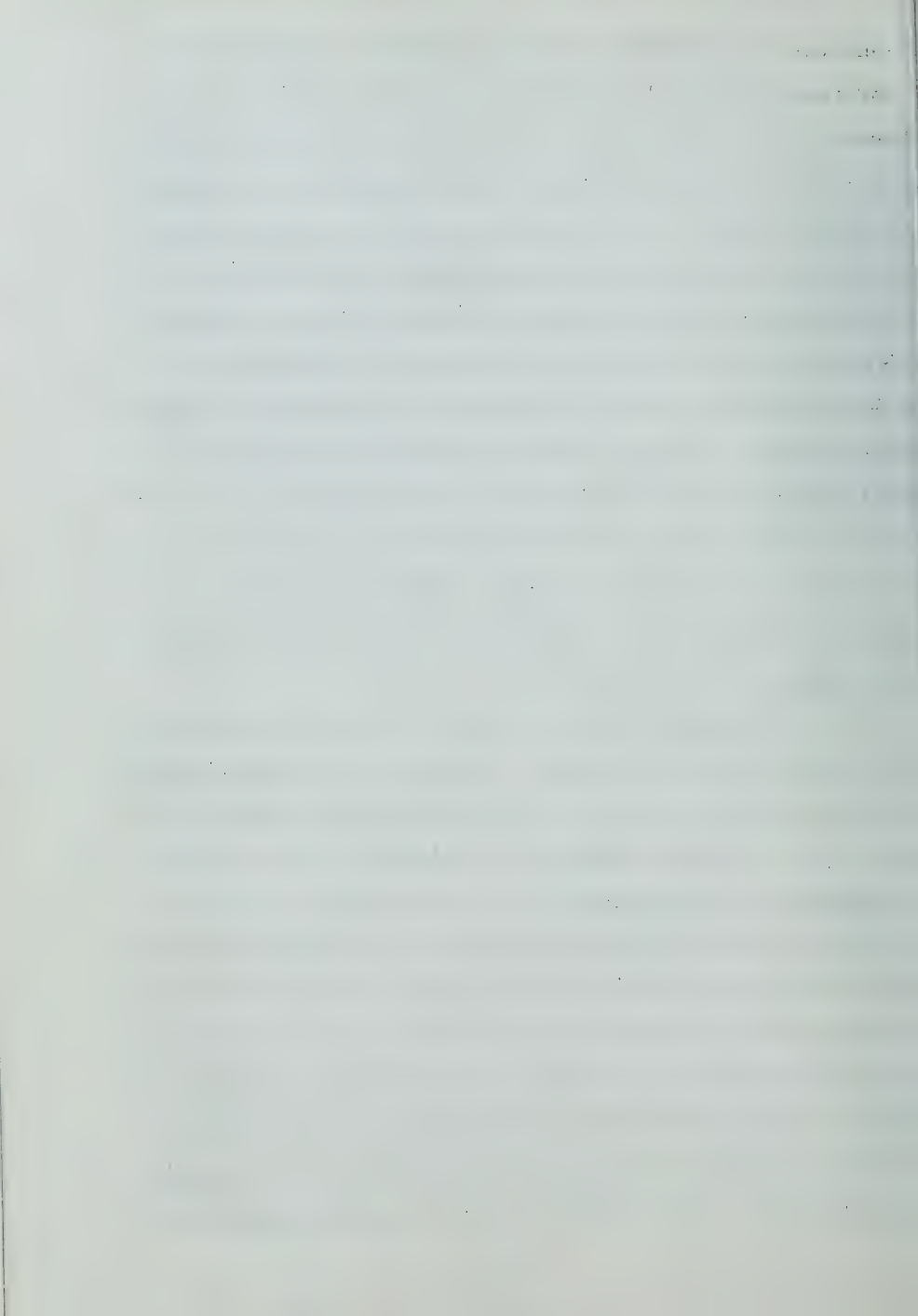
2. LeMaster v. Beto, 387 F.2d 612 (5th Cir. 1967) and Collins v. Florida, 387 F.2d 636 (5th Cir. 1968) are distinguishable in that, in the instant case, there is no indication that counsel received a definite request to file notice of appeal and refused to do so or that appellee was unaware of his right to appeal and have counsel appointed to represent him on appeal.





and thereby deprived of due process of law. Rule 37(a)(2) of the Federal Rules of Criminal Procedure requires as does Rule 31(a) of the California Rules of Court that notice of appeal be filed within 10 days of the rendition of judgment in a criminal case. The federal courts have long held that this requirement is mandatory and jurisdictional and that time limitations for the filing of notice of appeal cannot be extended by the court even in instances of excusable neglect or misunderstanding between the defendant and counsel. United States v. Robinson, 361 U.S. 220 (1960); Berman v. United States, 378 U.S. 530 (1964). In the absence of deceit or fraud, the courts will not excuse a failure to file notice of appeal for the mere neglect of counsel. Fennell v. United States, 339 F.2d 920 (10th Cir. 1965), cert. denied, 382 U.S. 852 (1965).

In Fennell, during the course of trial, defendant had requested counsel to appeal. Despite the fact that the defendant had no intention of relinquishing his right to appeal, that right was lost by the inaction of his attorney. In Rodriguez v. United States, 387 F.2d 117 (9th Cir. 1967) this Court refused to allow a defendant in a federal prosecution to file late notice of appeal where oral notice of appeal had been given but counsel failed to file written notice within the time required by statute. The federal courts have applied a similar standard in cases resulting in the denial of a right to appeal arising in the state courts. In King v. Wainwright, 368 F.2d 57 (5th Cir. 1966), cert. denied, 389



U.S. 795 (1966) a state prisoner was deprived of his right of direct appeal due to a procedural error of his retained counsel. The court noted that the mistake of the applicant's counsel in failing to perfect the appeal did not constitute a denial of due process.

Citing Anders v. California, 386 U.S. 738 (1967) the District Court held that counsel was bound to proceed as an advocate in preserving the right of his client to appeal. The apparent impression of the District Court was that, in failing to file notice of appeal, counsel did not afford his client adequate representation. The federal cases heretofore cited indicate that the right of appeal is not absolute and that even neglect of counsel which results in the loss of the right to appeal will not compel the institution of a late appeal. Certainly a misunderstanding between counsel and his client which results in the loss of the right to appeal does not constitute a violation of due process. See Fennell v. United States, 339 F.2d 920 (10th Cir. 1965), cert. denied 382 U.S. 852 (1965) and King v. Wainwright, 368 F.2d 57 (5th Cir. 1966), cert. denied, 389 U.S. 795 (1966).

In Phelps v. United States, 373 F.2d 194 (10th Cir. 1967), cert. denied, 387 U.S. 913, trial counsel persuaded the defendant not to appeal from a federal conviction. When the District Court allowed the defendant to file a late appeal, the Court of Appeal reversed holding that there was no right to institute a late appeal where there was no indication that the advice of counsel in deterring defendant from filing notice



of appeal was not actuated by counsel's best judgment under the circumstances. Appellant notes that certiorari was denied in the Phelps case after the decision in Anders had been filed.

The record clearly indicates that appellee was aware of his right to appeal having been advised thereof by his appointed counsel. It is also clear that appointed counsel informed appellee that notice of appeal must be filed within 10 days after the imposition of sentence and that he would file notice of appeal if he were able to ascertain any meritorious basis for an appeal. Finally, though not discussed in the order of the District Court granting the petition, it is clear that appointed counsel believed appellee to have acquiesced in his offer to review the case with a view to the possibility of appeal and acted accordingly in reviewing the record, determining that an appeal was without merit and failing to file timely notice of appeal. For the reasons stated above, appellant submits that the evidence failed to establish that appellee has been denied either equal protection or due process of law.

## II

THE DISTRICT COURT ERRED IN HOLDING THAT APPELLEE'S FAILURE TO ESTABLISH THAT THERE WAS MERIT TO HIS APPEAL WAS NOT A BAR TO AN ORDER TO REINSTATE THE APPEAL.

During the course of the evidentiary hearing held before the United States District Court for the Central District of California, appellant submitted points and authorities indicating that relief from a failure to perfect



appeal will not be granted in the absence of some indication that the appeal has merit. Accordingly, the District Court elicited testimony from appellee concerning the points which he would raise if he were allowed to file a belated appeal. As previously noted, appellee's testimony indicated no more than his belief that there were conflicts in the testimony of the prosecution witnesses.

In the order granting the petition, the District Court judge noted that appellee recited several alleged conflicts in testimony and errors in the admission of evidence. Appellant respectfully submits that there is no indication from either the testimony of appellee or his counsel that there were any possible errors in the admission of evidence. Accordingly, appellee's proposed contentions on appeal are directed to nothing more than the sufficiency of the evidence. As a matter of state law, all such conflicts must be resolved in favor of such testimony as would support the findings of guilt by the trier of fact. People v. Daugherty, 40 Cal.2d 876 (1953), cert. denied, 346 U.S. 827 (1953); People v. Newland, 15 Cal.2d 678, 104 P.2d 778 (1940).

This Court has consistently held that relief from failure to perfect an appeal within the time designated by statute will not be granted in the absence of some indication that the appeal is meritorious. In Rodriguez v. United States, 387 F.2d 117 (9th Cir. 1967) this Court held that counsel's failure to file written notice of appeal within the statutory time limitation would not be excused and the appeal reinstated





in the absence of an assertion that the failure to appeal resulted in the loss of a basic right. The court noted that petitioner's allegations disclosed neither the nature of any error nor that prejudice had resulted. In McGarry v. Fogliani, 370 F.2d 42 (9th Cir. 1966) this Court declined to grant relief to a state prisoner who alleged that his retained counsel failed to perfect his appeal where the prisoner failed to show any prejudicial errors which would have called for a reversal.

In Doyle v. United States, 366 F.2d 394 (9th Cir. 1966), a motion to vacate judgment in a federal conviction, the record indicated that no appeal had been perfected on behalf of an indigent defendant who was unaware of his right to appeal and have counsel appointed. In remanding the case to the District Court, this Court noted that the instructions given at trial included one "so plainly erroneous and prejudicial that a court upon appeal would necessarily notice it as plain error" and held as a matter of law that there was "substantial and reversible error."

The case most often cited by this circuit and other circuits for the proposition that a belated appeal will not be allowed in the absence of "plain error" is Dodd v. United States, 321 F.2d 240 (9th Cir. 1963). In Dodd, appointed counsel of a federal prisoner failed to file notice of appeal although requested to do so. Noting that failure to appeal might not be excused by a mere showing of neglect of counsel, this Court required that "plain reversi-



ble error at the trial" be demonstrated in order to justify the granting of relief. The court remanded the case to the District Court for a hearing to determine if there was an intentional relinquishment of petitioner's known right to appeal and, if so, to determine if petitioner suffered any prejudice in not securing a review by direct appeal. See also Watkins v. United States, 356 F.2d 472 (9th Cir. 1966); Thomas v. United States, 343 F.2d 49 (9th Cir. 1965); Miller v. United States, 339 F.2d 581 (9th Cir. 1965); Wilson v. United States, 338 F.2d 54 (9th Cir. 1964).

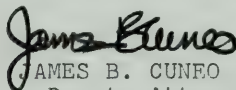
#### CONCLUSION

For all of the reasons stated above, appellant respectfully submits that the District Court erred in issuing the writ of habeas corpus and that the decision of the District Court should be reversed.

DATED: June 7, 1968

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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with these rules.

DATED: June 7, 1968

  
\_\_\_\_\_  
JAMES B. CUNEO  
Deputy Attorney General  
of the State of California



No. 22,650

JUL 13 1908

In the

# United States Court of Appeals

*For the Ninth Circuit*

A & A SIGN CO., INC.,

*Appellant,*

VS.

REX E. MAUGHAN, TRUSTEE, SUCCESSOR TO  
WALTER E. FULFORD, TRUSTEE,

*Appellee.*

Appeal from the United States District Court  
for the District of Arizona

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No. 22,650

In the

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A & A SIGN CO., INC.,

*Appellant,*

vs.

REX E. MAUGHAN, TRUSTEE, SUCCESSOR TO  
WALTER E. FULFORD, TRUSTEE,

*Appellee.*

---

Appeal from the United States District Court  
for the District of Arizona

### Brief for Appellee

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#### STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION

This matter arises from proceedings for corporate reorganization under Chapter X of the Bankruptcy Act, 11 U.S.C. §§ 501-676. All jurisdictional facts were established in the District Court by the debtor's amended petition (R. 9-16)<sup>1</sup>, which the District Court found to be in compliance with the requirements of Chapter X and approved.

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1. The record in this case consists of a volume of court filings plus a transcript of various hearings. The court filings are numbered consecutively so that an item on page 100 will be cited "R. 100".

This Appeal is from the Findings of Fact, Conclusions of Law and Order concerning the validity and priority of secured claims of creditors entered by the District Court on October 20, 1967, and October 24, 1967 (R. 282-314). This Court has jurisdiction under 11 U.S.C. § 47.

### STATEMENT OF FACTS

On July 15, 1965, the debtor, Mayer Central Building Corporation, filed a petition under Chapter X of the Bankruptcy Act (R. 1-8). On July 19, 1965, the District Court approved the petition and appointed Walter E. Fulford Trustee (R. 18). On November 24, 1965, the District Court entered its order approving the petition as amended (R. 18-21).

On September 5, 1965, the appellant, A & A Sign Co., Inc., filed its notice and claim of lien whereby it claimed a materialman's lien against real property and improvements situated in Phoenix, Arizona upon which it alleged it furnished labor and material for the debtor.

On February 18, 1966, the Trustee filed a petition seeking an order directing the Mayer Development Company, a partnership consisting of Eric D. and Lawrence D. Mayer, to assign and turn over to the debtor, the buyer's interest in an agreement to purchase land (hereinafter called the "Ann Clark property") (R. 24-31).<sup>2</sup>

The District Court referred the Trustee's petition to Vincent D. Maggiore, Referee and Special Master. On March 21, 1966, the master submitted his report to the District Court (R. 32).<sup>3</sup> In his report, the master found that

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2. A copy of this agreement appears at R. 29-31; appellant refers to the agreement as "Appellant's Exhibit No. 3" in its Opening Brief.

3. The appellant refers to the report as "Appellant's Exhibit No. 4" in its Opening Brief.

Lawrence D. and Eric D. Mayer, doing business as Mayer Development Company, a co-partnership, entered into an agreement to purchase the Ann Clark property. The master found that the debtor had made all the payments on the Ann Clark contract when the Mayers were its principal stockholders and managing officers. In his Conclusions of Law, the master stated that "the debtor corporation has both the legal and equitable right and title to the buyer's interest in said agreement." (R. 36). The master proposed an order requiring the Mayers as Mayer Development Company to execute and record a deed and assignment of all their right, title and interest in the agreement<sup>4</sup> (R. 37).

On April 2, 1966, the Mayers by a vendee's deed conveyed the Mayer Development Company's interest in the Ann Clark property to the Trustee. On May 9, 1966, the Court approved the Trustee's acquisition of the vendee's interest (R. 284).

On August 22, 1966, the District Court entered its order setting the time for hearing pursuant to Sections 196 and 197 of the Bankruptcy Act (R. 61), and those hearings were held in the fall of 1966.<sup>5</sup>

On February 10, 1967, appellant and the Trustee entered into a stipulation which in substance provided that the parties thereto agreed that the appellant had a valid materialman's lien against the property described in the

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4. Although the proposed order did not specify in whose favor the deed and assignment was to be executed, appellee concedes that it was to be in favor of the debtor.

5. On July 21, 1966, the Trustee filed his petition for an order setting a time for summary hearings of objections to claims pursuant to §§ 196 and 197 of the Bankruptcy Act (R. 58). A list of the claims to which the Trustee objected, with a brief statement of the reason for such objection, was attached to that petition as an exhibit. The Trustee listed a claim by A & A Sign Co., Inc. in the amount of \$21,493.28. In his explanation, the Trustee classified that claim as unsecured because of late lien filing (R. 60).

stipulation (R. 194-196). On February 20, 1967, pursuant to the stipulation, the District Court entered its order approving the stipulation (R. 196-198).

Subsequently, the Trustee filed a motion to correct the stipulation and the District Court's order dated February 20, 1967, by deleting the Ann Clark property from the land subject to that order. The basis of the Trustee's motion was that the Ann Clark property had been included in the stipulation and consequently in the order through mistake and inadvertence (R. 256-263). Appellant opposed this motion (R. 246-255). On October 9, 1967, the District Court heard the Trustee's motion.<sup>6</sup> The District Court took the motion under advisement after appellant submitted evidence with respect to its understanding of the stipulation.

Subsequently, appellant moved to admit as part of the Section 197 proceedings, the argument, testimony and evidence presented at the October 9th hearing (R. 275-279). The basis of that motion was that when appellant entered into the stipulation in February, 1967, it believed it unnecessary to present further testimony as to the validity of its lien, but upon objection to the stipulation, it believed it necessary to include the testimony as part of the Section 197 hearings previously held (T. 44). On October 20, 1967, at the continued hearing on appellant's motion to admit as part of the Section 197 hearings, the parties elicited further testimony from appellant's representative as to the validity of its lien.

On October 20, 1967, the District Court entered its Findings of Fact and Conclusions of Law.<sup>7</sup> The Court found that on April 2, 1966, by vendee's deed, the Trustee acquired the contract interest of Mayer Development Company to the

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6. The record contains a transcript of hearings held on October 9, 18 and 20, 1967. That transcript will be referred to as "T".

7. The District Court's Findings of Fact and Conclusions of Law which appellee deems material are set forth in Appendix A.



Ann Clark property and prior to April 2, 1966, the debtor had no interest in the Ann Clark property. The District Court further found that appellant had a contractual relationship with the debtor wherein appellant agreed to and did construct certain signs for the debtor on two properties called the "North" and "South" properties.<sup>8</sup> The District Court found that this work was performed pursuant to the contract from November 5, 1964 to July 2, 1965 and appellant recorded a Notice and Claim of Mechanics' Lien on September 23, 1965 claiming a lien against both the "North" and "South" property and against the Ann Clark property.

In its Conclusions of Law, the District Court held that valid mechanics' and materialmen's liens attached only upon the lot upon which were situated the structures on which the claimant performed labor and/or furnished materials (R. 303). The Court further held that appellant's lien, to the extent valid, attached only to the debtor's interest in the "North" property which had theretofore been determined to be valueless and even if valid, the lien exceeded the value of its security in the amounts claimed and thus its claim should be reclassified as unsecured in its entirety. The District Court further concluded that the Trustees were the owners of the vendee's interest in the Ann Clark property subject to no lien or encumbrance by any party to the proceedings (R. 306).

On October 24, 1967, the District Court entered its order wherein it held that the estate of the debtor corporation was the owner of the Ann Clark property and any funds generated from the sale of that property were to be free of all liens or encumbrances by any party to the proceedings (R. 313).

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8. The District Court viewed the debtor's property as constituting three distinct parcels: the "North" property, the "South" property and the "Ann Clark" property (R. 283-284).

### SUMMARY OF ARGUMENT

1. The District Court properly held that the Ann Clark property and proceeds from its sale were not subject to appellant's lien because the debtor had no interest in that property which was subject to the lien.

A. The Mayer Development Company did not hold the vendee's interest in the Ann Clark property as a constructive trustee because a constructive trust is created only by court decree and no such decree was made by the court.

B. Assuming arguendo that a constructive trust was established, the debtor corporation did not have an interest in the Ann Clark property which was subject to appellant's lien.

2. The District Court properly held that the Ann Clark property was not subject to any liens or encumbrances because appellant failed to perfect its lien and failed to prove that it had provided the labor and materials upon which its claim of lien was based.

A. Appellant did not substantially comply with the statutory requirements to perfect its lien.

B. Appellant did not prove that it furnished the labor and materials upon which its claim of lien was based.

3. The District Court properly relieved the trustee from the stipulation and the Court's order based upon that stipulation pursuant to Rule 60(b), Federal Rules of Civil Procedure on the grounds of mistake, inadvertence and excusable neglect on the part of the trustee.

A. The District Court properly relieved the trustee of the stipulation which he had entered into as a result of mistake, inadvertence, or excusable neglect.

B. The District Court properly relieved the trustee from its order pursuant to Rule 60(b) Federal Rules of Civil Procedure.

C. The appellant waived its right to rely on the stipulation by electing to attempt to prove its lien.

**I. The District Court Properly Held That the Ann Clark Property and Proceeds from Its Sale Were Not Subject to Appellant's Lien Because the Debtor Had No Interest in That Property Which Was Subject to the Lien.**

**A. INTRODUCTION.**

On April 2, 1966, Mayer Development Company, a partnership, executed a vendee's deed to the Ann Clark property in favor of the debtor. The District Court found that prior to April 2, 1966, the debtor had no interest in the Ann Clark property. If the debtor had no interest in the Ann Clark property when the appellant performed its work, then there is no interest to which appellant's lien or claim of lien could attach. We do not understand the appellant to contend otherwise. Instead, the appellant contends that the debtor had a vendee's interest in the Ann Clark property at the time appellant allegedly performed the work upon which its claim of lien is based. The appellant's contention is based upon two propositions: (1) the original vendee, Mayer Development Company, held the vendee's interest as a constructive trustee for the debtor; and (2) because the Mayer Development Company held the vendee's interest as a constructive trustee for the debtor, the debtor's vendee's interest in the property relates back to October 1, 1963, the date of the agreement for the sale of the property between Ann Clark and the Mayer Development Company.

Contrary to appellant's contentions, no constructive trust was created or existed and even if a constructive trust did exist the debtor's vendee's interest does not relate back

prior to April 2, 1966 and was not subject to a materialman's lien. Accordingly, at the time appellant performed its work and filed its claim of lien the debtor had no interest to which appellant's lien could attach.

**B. THE MAYER DEVELOPMENT COMPANY DID NOT HOLD THE VENDEE'S INTEREST IN THE ANN CLARK PROPERTY AS A CONSTRUCTIVE TRUSTEE BECAUSE A CONSTRUCTIVE TRUST IS CREATED ONLY BY COURT DECREE AND NO SUCH DECREE WAS MADE BY THE COURT.**

A court decree expressly establishing a constructive trust is essential to its existence. *International Refugee Organization v. Maryland Drydock Co.*, 179 F.2d 284, 287 (4th Cir. 1950); *Papazian v. American Steel & Wire Co. of New Jersey*, 155 F.Supp. 111 (N.D. Ohio 1957). "A constructive trust, as distinguished from an express or preexisting trust, is one requiring the declaration of a court of equity." *Memphis Memorial Park v. McCann*, 133 F.Supp. 293 (M.D. Tenn. 1955). See generally 89 C.J.S. Trusts §§ 139, 155 (1955); Bogert, Trusts and Trustees, § 472 (1935, 1946).

The appellant states that it is clear beyond dispute that a constructive trust existed (Appellant's Opening Brief, p. 12). The appellant does not and could not rely upon a decree establishing a constructive trust because no decree was entered by the District Court or Referee. Instead, the appellant apparently contends that a constructive trust exists by implication because it contends that the master's report can lead to only one conclusion: that the Mayer Development Company held the vendee's interest in the Ann Clark property as a constructive trustee for the debtor (Appellant's Opening Brief, p. 12-13). In support of this assertion, the appellant quotes at length from two treatises on the law of trusts (Appellant's Opening Brief, p. 12). Those authorities do not suggest that a constructive trust is the exclusive remedy by which one may obtain an interest in property

under the circumstances presented in the instant case. Nor do they suggest that a constructive trust may be established by implication without a court decree. Instead, they suggest a contrary conclusion: A court decree is essential to the establishment of a constructive trust.

It is well established that bankruptcy proceedings are equitable in nature and are to be administered in accordance with general principles of equity. See generally, 1 Collier, *Bankruptcy*, ¶ 2.09 (14th ed. 1967). See also 11 U.S.C. §§ 46, 501.

The master's report did not establish a constructive trust. Instead, the master simply proposed an exercise of the inherent equitable power of the Bankruptcy Court by proposing an order requiring the Mayer Development Company to convey its interest in the Ann Clark property to the Trustee. The record does not disclose that the Mayer Development Company executed the vendee's deed pursuant to an order of the Court.<sup>9</sup> However, even if it did so, that order would merely be an exercise of the inherent equitable powers of the Bankruptcy Court.

The appellant's reliance upon the master's findings and conclusions is not well founded for another reason. The master's report is merely advisory and must be confirmed by the District Court to be effective. *In Re Mifflin Chemical Corporation*, 123 F.2d 311 (3rd Cir. 1941) cert. denied 315 U.S. 815 (1942); *Gleeson v. Karr*, 219 F.2d 64 (9th Cir.

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9. The appellant states that the Referee "ordered the Mayer Development Company, a partnership, to execute a deed and assignment of their buyer's interest to the debtor corporation. This 'turn over' order was not resisted by the Mayer Development Company and was shortly thereafter complied with" (Appellant's Opening Brief, p. 25). This statement is not unsupported by the record. The master proposed an order (R. 37). Subsequently, the Mayer Development Company executed its vendee's deed in favor of the Trustee. Still later, the District Court approved the Trustee's acquisition of the vendee's interest (R. 284).

1955) cert. den. 350 U.S. 827 (1955); Cf. *Garden City Canning Co. v. Addy*, 116 F.2d 137 (9th Cir. 1940).

If as the appellant contends the master found a constructive trust existed and the debtor's interest related back to 1963, then it is clear that the District Court did not accept his findings or adopt his report since the Court expressly found that the debtor corporation had no interest in the Ann Clark property prior to April 2, 1966.

It is clear that no constructive trust was established, directly or by implication.

**C. ASSUMING ARGUENDO THAT A CONSTRUCTIVE TRUST WAS ESTABLISHED, THE DEBTOR CORPORATION DID NOT HAVE AN INTEREST IN THE ANN CLARK PROPERTY WHICH WAS SUBJECT TO APPELLANT'S LIEN.**

**1. The Imposition of a Constructive Trust Is an Equitable Remedy and It Does Not Create Substantive Rights.**

The appellant contends that if the Court found that the Mayer Development Company held the vendee's interest in the Ann Clark property as a constructive trustee for the debtor, then the debtor's interest as vendee relates back to the time when that interest was acquired by the Mayer Development Company. The appellant misunderstands the effect of the imposition of a constructive trust. The imposition of a constructive trust does not create substantive rights. It is merely a procedural device; an equitable remedy.

It is a basic principle of equity jurisdiction that equity acts only in personem and only indirectly to the res. The application of this principle to this case is illustrated by one author's statement:

The meaning of this principle simply is that a decree of a court of equity, while declaring the equitable estate, interest, or right of the complainant to exist, does not operate by its own intrinsic force to vest the



complainant with the legal estate, interest, or right to which he is pronounced entitled; such decree is not itself a legal title, nor can it either directly or indirectly transfer the title from the defendant to the complainant (citations omitted).

27 Am.Jur. 2d, Equity, § 122 at p. 649 (1966).

Even if a constructive trust was established by the District Court, the debtor corporation did not acquire an interest in the Ann Clark property until the vendee's deed was executed on April 2, 1966.

In *Melenky v. Melen*, 233 N.Y. 19, 134 N.E. 822 (1922), the plaintiff's husband conveyed land to his son who orally agreed to reconvey it upon demand. The father subsequently married and asked his son to reconvey the property. The son refused to do so but conveyed an estate for life to his father. The Court held that the plaintiff could not maintain a suit to establish an inchoate right of dower in the land and to compel the son to reconvey it. The Court said that the father might be entitled to enforce a reconveyance on the ground that the son was guilty of an abuse of a confidential relation and therefore was a constructive trustee of the property, yet the father had no such estate in the land as to entitle his wife to dower. The Court held that until the entry of a decree, the defrauded grantor was not the owner of an estate but was the owner of an obligation, a chose in action.

"A constructive trust is not a title to or lien upon property but a mere remedy to which equity resorts in granting relief against fraud; and it does not exist so as to affect the property held by a wrongdoer until it is declared by a court of equity as a means of affording relief." *International Refugee Organization v. Maryland Drydock Co.*, supra, p. 8. "A constructive trust is merely a procedural device . . . it is not a part of the substantive law . . . [and] does not

create in the party favored by it any new substantive rights. Its sole purpose is to enable the Courts to afford the victim of the wrong relief in specie." *Barnes v. Eastern and Western Lumber Company*, 287 P.2d 929, 949 (Ore. 1955) (En Banc).

Cf. *Salisbury v. Tibbetts*, 259 F.2d 59 (10th Cir. 1958), where the Court recognized that a constructive trust is only a fiction imposed as an equitable device to prevent injustice and it does not create any substantive rights.

The controlling authorities set forth above demonstrate that there is no merit to appellant's contention that the debtor corporation's vendee's interest relates back to the date the Mayer Development Company acquired that interest in 1963.

The authorities cited by appellant do not express a contrary view. Instead, they confirm that a constructive trust is merely a procedural device and it does not create substantive rights. The appellant cites *Markel v. Phoenix Title & Trust Co.*, 100 Ariz. 53, 410 P.2d 662 (1966) (In Division) (Appellant's Opening Brief, p. 12) although it is not clear for what proposition that case is cited. In that case, suit was brought to impose a constructive trust on one-half the proceeds realized from a sale of real property. The plaintiff was divorced from her husband in 1939. In the divorce proceedings, the Court entered a judgment which approved and incorporated a property settlement wherein the husband agreed to give his wife a one-half interest in any funds obtained through lease, sale or disposal of certain land located in Arizona. Subsequently, the husband remarried and prior to his death his second wife sold the Arizona land. The plaintiff sought to impose a constructive trust upon one-half of the proceeds realized from the sale of that property. The trial court granted the defendant's motion for judgment.



On appeal, the defendant contended that the judgment of the Kansas court attempted to transfer title to land in Arizona and thus was in violation of a Supreme Court case which prohibited one jurisdiction from directly affecting title to land in another jurisdiction. In commenting upon this contention, the Court said:

The Kansas Court expressly left title in the name of Earl E. Van-Y and gave plaintiff a "one-half interest in any *funds* \* \* \* obtained through lease or sale" . . . . We believe *MacDonald v. Dexter*, (citation omitted) is quite similar to the case before us. There, a Missouri court *denied* a party an interest in the proceeds of land situated in Illinois . . . . Illinois held that an adjudication as to an interest in *proceeds* in land situated in Illinois was not an adjudication directly as to the title of the land itself. The Court explained its holding as follows:

"\* \* \* This contract obviously was not intended to give appellant any right to have a portion of the land in question conveyed to him or to give him any interest of any kind in the land itself, but only an interest in the net profits that might arise from its sale." (Emphasis Added)

100 Ariz. 53, 56; 410 P.2d 662, 664

Since the Court expressly found that an interest in real property was not in issue, that case does not support appellant's contention that the debtor's vendee's interest relates back.

Similarly, *Linder v. Lewis, Roca, Scoville & Beauchamp*, 85 Ariz. 118, 333 P.2d 286 (1958) (Appellant's Opening Brief, p. 12) is not relevant to the instant case. That case arose from a garnishment where the garnishor alleged a fraudulent conveyance and others intervened asserting an attorneys' lien. The Court held that an attorney has a charging lien against funds received in payment of a judg-

ment obtained through his services and a judgment creditor could not assign the judgment claim and its assignee was to be considered as holding those funds to the attorneys' use and benefit. *Smith v. Connor*, 87 Ariz. 6, 347 P.2d. 370 (1959) (Appellant's Opening Brief, p. 12) does not support appellant's contention. In that case, the Court expressly recognized that a constructive trust is a legal fiction.

The appellant places great emphasis upon the master's report. That report does not support the appellant's contention. The master did not propose that an order be entered vesting the vendee's interest in the debtor. Instead, he proposed an order be entered directing the Mayer Development Company to convey the vendee's interest to the debtor. Until that conveyance was made on April 2, 1966, the debtor had no interest in the Ann Clark property to which the appellant's lien could attach.

## **2. A Vendee's Interest Is Not Subject to a Materialman's Lien.**

Even assuming arguendo that the debtor had a vendee's interest at the time appellant performed its work, the appellant is not entitled to its lien because a vendee's interest in real property is not subject to a materialman's lien.

Although there is admittedly a division of authority, the better reasoned view is that a vendee's interest in real property is not subject to a materialman's lien. In *Callejo-Borges v. Rochelle*, 316 F.2d. 812 (5th Cir. 1963) a bankrupt was in possession of certain property under the terms of a contract or option to purchase. The trustee contended that the contract to purchase was valid while the owner of the land contended that the bankrupt's option had expired before bankruptcy. While this controversy was pending, the parties reached a settlement under the terms of which the owner paid the trustee a cash settlement. This settlement

was approved by the bankruptcy court and the trustee was authorized and did execute a quit claim of the property to the owner. The appellant undertook to impress a mechanic's lien upon the property. He had entered into a written contract with the bankrupt for the performance of certain professional services in connection with improvements to be constructed upon the bankrupt's properties. He contended that at the time of bankruptcy the bankrupt owned an interest of value in the property and that his lien affixed to that interest. He further asserted that his claim should be classified as a secured claim against the funds received from the owner of the property. The referee held that the claim was not secured "because the bankrupt did not have an interest in the property of such a nature as to permit a mechanic's lien to attach . . . ." On appeal, the Court held that this ruling was correct:

Article 5452 of Vernon's Civil Statutes of Texas affords a lien to one who furnishes labor or material by virtue of a contract "with the owner or owners \* \* \*" of the property in question. In an early case the Supreme Court of Texas held that one in possession of property, under a contract to purchase (who thereafter defaulted, so that the sale was not consummated) was not an "owner" who might fix a lien thereon.

316 F.2d. 812, 813

Similarly, in *Bledsoe v. Colbert*, 120 S.W.2d 909 (Ct. Civ. App. Tex. 1938), the plaintiff sought to foreclose a laborer's lien for labor performed for a vendee in possession under a contract of sale. On appeal, the Court held that the trial court properly granted judgment for the defendants:

Under these facts, was Colbert [the vendee], as a matter of law, the owner of the lot? We think not. Even if the deed, found to have been placed in escrow and never delivered, had been delivered and had taken

effect according to its terms, the legal title would have remained in Marrow and Upshaw [the vendors], and only an equitable title would have thereby vested in Colbert. The former would have had the right, upon default in payment of any of the installments of the purchase price, to rescind the conveyance, thereby extinguishing any equitable title to Colbert. Such right would be defeated if Colbert could have burdened the property with a lien claimed. This question, we think, must be regarded as having been settled by the Supreme Court in *Galveston Exhibition Ass'n v. Perkins*, 80 Tex. 62, 15 S.W. 663 (citations omitted).

120 S.W.2d. 909, 910

In *Holland v. Farrier*, 130 N.E. 823 (Ind. App. C.T. (1920)) the Court said:

A person in possession of real estate under a contract of purchase cannot defeat or cloud the vendor's title by suffering a mechanic's lien to be filed against such real estate for improvement made thereon by him.

130 N.E. 823, 825

The *Farrier* case was cited and quoted with approval in *Harris v. Mt. Vernon Lumber Co.*, 173 N.E.2d. 672 (Ind. App. Ct. 1961).

None of the cases relied upon by appellant hold that a vendee's interest in real property is subject to a materialman's lien. Therefore, they are simply not relevant.

The appellant does not contend that the debtor was an agent for the owner, Ann Clark, in contracting with the appellant for the work allegedly performed by it. Nor would the record support such contention. Cf. *Mulcahy Lumber Co. v. Ohland*, 44 Ariz. 301, 36 P.2d. 579 (1934)

Therefore, there was no interest in the Ann Clark property to which appellant's lien could attach.

**II. The District Court Properly Held That the Ann Clark Property Was Not Subject to Any Liens or Encumbrances Because Appellant Failed to Perfect Its Lien and Failed to Prove That It Had Provided the Labor and Materials Upon Which Its Claim of Lien Was Based.**

**A. APPELLANT DID NOT SUBSTANTIALLY COMPLY WITH THE STATUTORY REQUIREMENTS TO PERFECT ITS LIEN.**

**1. The Appellant's Notice and Claim of Lien Did Not Contain the Names of the Owners as Required by Statute.**

Section 33-993 A.R.S. which prescribes the procedure necessary to perfect a materialman's lien in Arizona provides as follows:

In order to impress and secure the lien provided for in this article, every original contractor, within ninety days, and every other person claiming the benefits of this article, within sixty days after the completion of a building, structure or improvement, or any alteration or repair thereof, shall make duplicate copies of a notice and claim of lien and file one copy with the county recorder of the county in which the property or some part thereof is located, and within a reasonable time thereafter serve the remaining copy upon the owner of the building, structure or improvement, if he can be found within the county. *The notice and claim of lien* shall be made under oath by the claimant or some one with knowledge of the facts, and *shall contain*:

1. A description of the lands and improvements to be charged with a lien, sufficient for identification.

2. *The name of the owner or reputed owner of the property concerned*, if known, and the name of the person by whom the lienor was employed or to whom he furnished materials.

3. A statement of the terms, time given and conditions of the contract, if it is oral, or *a copy of the contract, if written*.

4. A statement of the lienor's demand, after deducting just credits and offsets.

(emphasis added)

The appellant asserts that there has been substantial compliance with the requirements of Section 33-993 (Appellant's Opening Brief, p. 19). It states that "the names of the owners and reputed owners are also clearly set forth. . . ." (Appellant's Opening Brief, p. 19). It is difficult to understand how appellant can make this statement when the face of the notice and claim of lien clearly shows that neither Ann Clark nor the Mayer Development Company, a partnership, were named.<sup>10</sup>

It is well settled in Arizona that there has not been substantial compliance with the procedures to perfect a materialman's lien when the owner or reputed owners of the property concerned are not named in the notice and claim of lien. *American Coarse Gold Corporation v. Young*, 46 Ariz. 511, 52 P.2d 1181 (1935). See also *Irwin v. Murphy*, 81 Ariz. 148, 302 P.2d. 534 (1956) where the court said the statute relating to materialmen's liens must be strictly followed to perfect the lien. In *Peterman-Donneley Eng. & Con. Corp. v. First Nat. Bank*, 2 Ariz. App. 321, 408 P.2d. 841 (Ct. App. 1965), the Court said:

The purpose of the requirements of A.R.S. 33-993 is to give the property owners an opportunity to protect themselves and time to investigate the claim and determine whether it is a proper charge and lien.

2 Ariz. App. 321, 323, 408 P.2d. 841, 843.

Obviously, if this purpose is to be satisfied, then the property owner must be named in the notice and claim of lien and served with a copy. If the owner is not named and

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10. The caption as it appeared in the appellant's Notice and Claim of Lien is set forth in Appendix B. The appellant refers to its notice and claim of lien as "Appellant's Exhibit No. 1" in its Opening Brief. It was admitted as part of Appellant's Exhibit AA-2 at the October 9th hearing (T. 10).

served then the purpose of the statute is frustrated and there has not been substantial compliance with the statute.

Ann Clark and the Mayer Development Company were the vendor and vendee, respectively, of the Ann Clark property at the date of appellant's notice and claim of lien. Appellant does not dispute this. Although the appellant attempted to prove the validity of its lien, the record does not show that Ann Louise Clark and the Mayer Development Company were served with a notice and claim of lien. Obviously, if they were not named in the notice the reasonable conclusion is that they were not served. The appellant does not state that Ann Clark and Mayer Development Company were served with a copy of the notice. We believe that appellant's reasons for omitting such a statement are obvious. The record is totally devoid of any proof that such service was made. It was incumbent for appellant to prove that copies of its notice were served. *Love Lumber Co. v. Reaser*, 212 N.E.2d. 655 (Ohio 1964.)

In *Leeson v. Bartol*, 55 Ariz. 160, 99 P.2d. 485 (1940) (Appellant's Opening Brief, p. 20), a claimant filed its notice and claim of lien with the county recorder and within a reasonable time thereafter served the owners of the improvement with an exact copy of the notice. The statute required the claimant to serve a duplicate copy of its notice upon the owner of the building or improvement. The owner contended that since the notice was not made in duplicate this defeated the validity of the lien. The Court rejected this contention and held that service of an ordinary copy of the original notice would be sufficient compliance under the statute.



In the instant case, we do not contend that appellant's lien is invalid because an ordinary copy rather than a duplicate original copy of the notice was served upon the owners or reputed owners. Rather, we contend that the appellant's lien was not validly perfected because the appellant failed to serve a copy of the notice, ordinary or duplicate original, upon the owners Ann Clark and Mayer Development Company. In *Leeson*, supra, the Court did not suggest that a lien claimant substantially complies with the requirements for perfecting its lien when it fails to serve a copy of its notice upon the owners or reputed owners. Instead, the Court's comments clearly suggest that such service is essential to satisfy the requirements of Section 33-993. In the absence of such service there cannot be substantial compliance with the statute.

Similarly, the appellant's reliance upon *Peterman-Donnelly Eng. & Con. Corp. v. First Nat. Bank*, supra, p. 18 is not well founded. In that case, the owner contended that a contractor had failed to perfect its lien because a copy of the notice was not served on it. Service of the notice was made upon the law partner of the statutory agent of the owner and subsequently the statutory agent executed a formal acknowledgement of service. The Court rejected the contention that service had not been made and held that service was made in strict compliance with the statute. In the instant case, service of the notice was not made upon the owner directly or indirectly by service upon its statutory agent. Accordingly, the *Peterman* case does not support appellant's contention that there was substantial compliance with the statutory requirements for perfection of its lien.

To prove the validity of its lien, appellant was required to prove that it had complied with the essential require-



ments of the statute. It did not do so. Accordingly, the District Court properly held that the Ann Clark property was not subject to appellant's lien.

**2. The Appellant's Notice and Claim of Lien Did Not Contain a Copy of the Written Contract or Sufficient Statement of Its Terms and Conditions.**

Section 33-993 A.R.S. requires a lien claimant to include in its notice and claim of lien a "statement of the terms, time given and conditions of the contract, if it is oral, or a copy of the contract, if written." A strict reading of this provision would require that the appellant attach a copy of its contract to its notice. The record does not disclose that such a copy was attached to the notice and apparently appellant concedes that this was not done. Instead, the appellant cites and quotes at length from several cases which we presume appellant relies upon in excusing its failure to attach a copy of the contract.

Before discussing the authorities relied upon by appellant, it would be desirable to set forth in full those portions of appellant's notice which it could rely upon in contending that there has been substantial compliance with the statute. Appellant's notice provided in pertinent part:

2. Claimant has performed labor and furnished materials in the alteration, construction and erection of various signs, flagpoles, etc. in and upon those certain buildings now upon that real property [followed by a description of the real property].

. . . .

6. That said labor and materials furnished by claimant were furnished pursuant to oral and written contracts and instructions and invoices dated from September 24, 1964 through and including June 28, 1965, entered into with Mayer Central Building Cor-

poration, acting for itself as owner. Copies of the various invoices and charges are attached hereto and by reference thereto made a part hereof. The total amount due is \$21,493.28.

Although the notice stated that the invoices were attached, apparently no invoices were attached. Instead, what the appellant terms a "Summary Invoice" is attached. That summary invoice merely lists a series of dates, what appear to be invoice numbers, and the amount of charges for each such invoice. Since the appellant refers only to this "Summary Invoice" and does not refer to any copies of invoices, we must conclude that copies of the invoices were not attached to the notice despite its statement to that effect (Appellant's Opening Brief, p. 22).

The appellant cites and quotes from *Lanier v. Lovett*, 25 Ariz. 54, 213 Pac. 391 (1923), although it is not clear for what proposition that case is cited. If the appellant cites that case for the proposition that a materialman may perfect a lien under Section 33-993 by substantially complying with the requirements of that statute, we concede that is correct. If, however, the appellant relies upon that case to show that it has substantially complied with the requirements of Section 33-993, then we do not agree. In *Lanier*, a suit was brought to establish and foreclose a mechanic's lien. Unlike the instant case, the owner or reputed owner was apparently named in and served with the notice. The claimant's notice expressly stated that the claimant entered into a contract for the furnishing of labor and material and for the installation of plumbing which contract was oral and that the materials furnished and labor performed thereon was to be paid upon the completion of the building in which the plumbing was to be installed. The defendant contended that the contract set out in the notice did not meet the re-

quirements of the statute because it did not state what labor was to be performed or material furnished and because it did not itemize the material and labor. The Court observed that the omission in the notice to itemize the different articles that went into the job and the days of labor consumed in placing them could be excused on the theory that under the contract they were not to be paid for as furnished or rendered but as a whole. The Court said that the statement of terms, time given and conditions of the contract as contained in the notice to the effect that the plaintiff was to install all plumbing and furnish all material for a lump sum to be paid on the completion of his contract was sufficient compliance with the law. It should be noted that an oral agreement was involved in the *Lanier* case while in the instant case the appellant relied at least in part upon written contracts. The statute clearly requires that a copy of the written contract be attached in a notice and claim of lien. Obviously, there was no need to consider that requirement in *Lanier* since a written contract was not involved. To that extent, appellant can not rely upon *Lanier* to excuse its failure to attach a copy of its written contract. Furthermore, in its notice the appellant merely stated that it had performed labor and furnished materials in the alteration, construction and erection of various signs, flagpoles, etc. and that the labor and materials furnished were furnished pursuant to oral and written contracts and instructions. The appellant stated that the contract had been performed pursuant to its terms but it made no attempt to describe even in general terms the terms and conditions of the contract as did the claimant in the *Lanier* case. Accordingly, that case does not support the contention that appellant substantially complied with the statute.

In *Peterman-Donnelly Eng. & Con. Corp. v. First Nat. Bank*, supra, p. 18 the owner contended that the contractor

had failed to perfect its lien because its notice and claim of lien did not contain a copy of the written contract. The pertinent portions of the notice provided:

3. \* \* \* that on September 18, 1961 the Peterman-Donnelly Engineers & Contractors Corporation entered into a contract with The Lost Dutchman Baseball Association, Inc. which, together with change orders thereafter agreed upon, was for the construction of fences, batter's eye, bleachers, ramps, box seats, dugouts, dugout tunnel, backstop, press box and other miscellaneous improvements.

4. \* \* \* that the original contract was for a price of \$19,800.00; in addition thereto, by change orders and additions agreed to by the parties, \$12,545.38 in other work has been performed.

In considering whether this notice was in substantial compliance with the statutory requirement that a copy of the contract be attached to the notice, the Court observed:

Obviously the quoted portions of the notice do not strictly satisfy the statutory requirement of a " \* \* \* copy of the contract, \* \* \*" but it is equally evident that the principal terms of the agreement have been incorporated into the notice: the parties, the date, the purpose and the consideration. In addition, elements of subsequent oral agreements are included. What is lacking is a recital of the fine print terms of a standard form contract.

When the appellant's notice and claim of lien is tested by the criteria set forth above it seems clear that the appellant did not substantially comply with the statute. The principal terms of the agreement have not been incorporated into its notice: the date, the purpose and the consideration have not been set forth. The appellant's notice simply states "that said labor and materials fur-

nished by claimant were furnished pursuant to oral and written contracts and instructions. . . .”

In *Ranch House Supply Corp. v. Van Slyke*, 91 Ariz. 177, 370 P.2d 661 (1962) (In Division) (Appellant’s Opening Brief, p. 23), the question was whether the plaintiff was a “materialman” within the meaning of the Arizona materialman’s lien statute. That case did not involve the question whether a notice and claim of lien was in substantial compliance with statutory requirements for perfection. Accordingly, it is simply not relevant to the issues presented here.

In *Pioneer Plumbing Supply Co. v. Southwest Saving and Loan Ass’n*, 3 Ariz. App. 495, 415 P.2d 893 (Ct. App. 1966), vacated, 102 Ariz. 258, 428 P.2d 115 (1967) (En Banc) (Appellant’s Opening Brief, p. 23), the question was whether a subcontractor and his supplier could assert an equitable lien against undisbursed construction loan funds and whether the equitable lien would be entitled to priority over the rights of a mortgagee. The Supreme Court’s comments clearly show that there was no issue as to the substantial compliance with the statutory requirements for perfection of a materialman’s lien and accordingly that case can hardly be considered determinative of the issues presented here. The Supreme Court recognized that there were limitations to protecting the rights of materialmen:

Pioneer and Rural contend that it is the policy of Arizona to protect the rights of those who furnish labor and materials to improve property. With this principal we agree; however, those rights must be established under existing law.

102 Ariz. 258, 428 P.2d 115.

The appellant seeks to excuse its failure to substantially comply with the statutory requirement for perfecting its

lien by relying upon the general policy to protect materialmen's liens. However, the Supreme Court has recognized that this policy is not without limitation and although a materialman will not be required to strictly comply with the statutory requirements for perfecting a lien, he must substantially comply with those requirements. This the appellant did not do.

**B. Appellant Did Not Prove That It Furnished the Labor and Materials Upon Which Its Claim of Lien Was Based.**

Section 33-981 A.R.S. provides :

A. Every person who labors or furnishes materials, machinery, fixtures or tools in the construction, alteration or repair of any building, or other structure or improvement whatever, shall have a lien thereon for the work or labor done or materials, machinery, fixtures or tools furnished, whether the work was done or articles furnished at the instance of the owner of the building, structure or improvement, or his agent.

B. Every contractor, sub-contractor, architect, builder or other person having charge or control of the construction, alteration or repair, either wholly or in part, of any building, structure or improvement, is the agent of the owner for the purpose of this article, and the owner shall be liable for the reasonable value of labor or materials furnished to his agent.

To entitle a claimant to recover upon its claim of lien, it is not sufficient to merely comply with the procedures to perfect that lien as set forth in Section 33-993 A.R.S. The claimant has the burden of establishing his right to a lien. *Holmes Oil Co. v. Rule*, 70 P.2d 86 (Okla. 1937); *Westinghouse Electric Supply Co. v. Hawthorne*, 150 P.2d 55 (Wash. 1944). The appellant has the burden of showing that it furnished the labor and materials for which it claimed a lien.

The basis of appellant's claim was that it furnished and installed signs. Yet, Mr. Magruder, appellant's vice-president and general manager, did not know how many signs it placed on the Ann Clark property,<sup>11</sup> or when the signs were placed on the property.<sup>12</sup> He could not testify as to

11. Q. (by Mr. Steiner) Sir, to make absolutely clear to the extent of your knowledge, first, do you know how many signs were placed on the Ann Clark property?

A. (by Mr. Magruder) No. If I may go ahead, I mean during the construction period there, no.

Q. Your answer is no?

A. "No."

Q. Secondly, what was the nature of the signs that were placed on the Ann Clark property?

A. They were directional signs and parking signs.

Q. A directional sign is one-way sign, or—

A. Right. During the construction period they were there for the purpose of getting in an area, because the parking lot was in quite a mess there, and they had certain areas of it open one time or the other, and they used this to direct them in and out.

Q. Did I understand your previous testimony that you thought there were three or four of such signs, or did you say you didn't know.

A. I didn't know. I don't know. (T. 69)

12. Q. (by Mr. Steiner) Very well. Now, do you know exactly when any one sign was placed on the Ann Clark property?

A. (by Mr. Magruder) Not specific dates. It was during the construction period.

One time was when they had part of the other driveways tied up.

Q. Now, you say during the construction period. What dates are we speaking of? Was it 1965, 1964?

A. Well, I haven't thought of this thing in specific dates, even specific years, because I was measuring our discussions, how long this thing has been drug out, but it was during the time they were constructing. I couldn't pin it down.

Q. Would you accept the year 1964 as being the year of construction, or do you know?

A. Frankly, no. I know that it was during the time construction was going on.

Q. So you don't even know what year it was going on?

A. No.

Frankly, I think that I should—construction period is all. Time seems to slip away. (T. 70-71)

Q. (by Mr. Pogson) Do you know when during the construction it was that the signs on the Ann Clark were put on the Ann Clark property?

A. Not specifically, no. (T. 68)



their value.<sup>13</sup> The signs were not on the Ann Clark property at the time appellant attempted to prove its lien.<sup>14</sup> He couldn't even state that the signs were on the property when

13. Q. (by Mr. Steiner) How much does a directional sign cost? How much was your charge for one directional sign, for Mayer Central?

A. (by Mr. Magruder) Well, there is quite a variation of types of signs, depending on the current problem, the construction, and so forth, as to how big or how small it could be made.

Q. Do you know as to the Ann Clark property signs which kind of directional and parking signs were used?

A. I know part of them. I believe there was one large directional sign, and the others were of a smaller nature.

Q. Very well. How much does one large directional sign cost, or how much did such a sign cost?

A. I don't know exactly what theirs cost.

I can give you an approximate cost of directional signs. I can't be specific.

Q. To the best of your knowledge, of what your company charged the debtor for one large directional sign?

A. I don't have those figures available. I don't know exactly. (T. 69-70)

Q. (by Mr. Pogson) What was your price? The price at which you sold these signs to the Mayers.

A. (by Mr. Magruder) You mean the entire—

Q. I am just talking about the signs that were on the Ann Clark property at one time.

A. I don't have those figures.

Q. Would you have any approximation?

MR. WOLFE: I am going to object to any approximations or speculations by the witness. He has answered that he doesn't know. (T. 66-67)

14. THE COURT: I mean, are they there now?

MR. MAGRUDER: No, they are not there now.

MR. WOLFE: They have been moved off the property?

A. (by Mr. Magruder) Yes, the last time I viewed the property—some of them have been shuffled around on the property. The last particular time I viewed the lot they were not there. (T. 15)

Q. (by Mr. Duecy) There are no signs on that property at this time?

A. At the last time I looked at it, of course they shuffle those around out there quite a bit, but the last time I looked at it, I didn't see any. (T. 20)

Q. They are not there at this time, are they?

A. Not the last time I looked at it, which was a week or two ago. (T. 21)



appellant filed its notice and claim of lien.<sup>15</sup> To be entitled to a lien, appellant was required to show that the signs it allegedly furnished for the Ann Clark property were of a permanent nature. *Westinghouse Electric Supply Co. v. Hawthorne*, supra, p. 26. Appellant's witness was unable to state with any degree of certainty how many or which signs were permanent.<sup>16</sup> He admitted that at least some, and probable all, the signs were temporary.<sup>17</sup>

15. Q. (by Mr. Pogson) Do you know whether those signs were still on the Ann Clark property in the Summer of 1965, which would be right after your company finished doing the last part of its work.

A. (by Mr. Magruder) If they were on the last part of 1965? Q. Or the Summer of 1965.

A. I couldn't say specifically. (T. 68)

16. None of the signs remained on the Ann Clark property at the time appellant attempted to prove its lien and possibly when appellant filed its Notice and Claim of Lien. See n. 14, 15 supra. The logical conclusion is that none of appellant's signs were permanent.

17. Q. (by Mr. Wolfe) Now, what kind of signs were they, as best you can remember?

A. (by Mr. Magruder) Well, we did a lot of small signs in addition to the big work down there. I can't remember exactly what it was, because during construction and entrance, and first getting their parking controlled there, there were small parking type signs.

Q. What kind of signs?

A. Small parking and directional type signs.

THE COURT: You mean temporary?

THE WITNESS: They could be temporary or permanent. (T. 15)

Q. (by Mr. Steiner) Are these signs movable signs?

A. They can be of this nature. In other words, some of them are planted in the ground, and some of them are of a portable nature. Of course any sign can be moved or relocated down there, the big signs, one of the big signs down there. They could be relocated.

Q. Do you recall how any sign was in fact attached to the Ann Clark property?

A. How any sign?

Q. Any one?

A. Some of them were set in the ground, and some were of a portable nature, portable stands. (T. 71-72)

Q. (by Mr. Pogson) Were they temporary signs for use during construction?

The record clearly shows that the appellant wholly failed to establish by competent evidence that it was entitled to its lien.

**III. The District Court Properly Relieved the Trustee from the Stipulation and the Court's Order Based Upon That Stipulation Pursuant to Rule 60(b), Federal Rules of Civil Procedure on the Grounds of Mistake, Inadvertence and Excusable Neglect on the Part of the Trustee.**

**A. INTRODUCTION.**

The appellant effected a partial settlement of its claim with the Valley National Bank and on February 2, 1966, it executed a partial release of its Claim of Lien (R. 271-274). At that time, the Trustee was asked to stipulate to the existence and validity of the appellant's lien for the balance due the work it performed on the North property (R. 257).

On February 10, 1967, the appellant and the Trustee entered into a stipulation which in substance provided that the parties thereto agreed that the appellant had a valid materialman's lien against certain real property which was set forth in full by legal description in the text of the stipulation.<sup>18</sup> On February 20, 1967, the District Court entered its order approving the stipulation. The Court's order was in all material respects identical to the stipulation except that the legal description of the real property was incorporated

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A. They could be left permanently, or they could be considered—I mean, small, they could be taken out and replaced, or relocated on the property.

Q. Were they in fact relocated?

A. Yes. In fact, to this date, the last time I looked at the lot, they had been shuffled around.

Q. And they are not any longer on the Ann Clark property?

A. Not the last time that I saw the property, which is a week or two prior to this hearing, or the last hearing. (T. 66)

18. The real property as described in the Stipulation is set forth in Appendix B and at R. 194-195.

in the order by reference to the stipulation (R. 196-198). The stipulation was prepared by counsel for appellant on his legal stationery (R. 194-198) and presented to the Trustee through counsel (R. 257). The Trustee and his counsel understood that the stipulation was presented to it under the assumption that the existence and validity of the appellant's lien was to be stipulated to as to the North property only. The Trustee and his counsel signed the stipulation under the same assumption. When the Trustee discovered that the Ann Clark property had been included in the stipulation and in the Court's order, he filed a motion to correct the stipulation and Court's order by deleting the Ann Clark property from the real property subject to that order.<sup>19</sup>

The Trustee and his counsel signed the stipulation as prepared because they had failed to check the legal descriptions. Had they done so, they would have discovered that the Ann Clark property was included and they would have deleted the Ann Clark property from the stipulation before signing it (R. 258, 262, 263). See also T. 2. The appellant did not dispute the Trustee's and counsel's statement that they did not intend or know that the Ann Clark property was to be included in the stipulation.<sup>20</sup> Instead, the appellant's counsel stated that the Trustee and his counsel probably overlooked the inclusion of the Ann Clark property in

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19. The legal description of the Ann Clark property is "Lot One (1), Block One (1), CATALINA PLACE. . . ." The legal description of the North property is "Lots Two (2) through Eighteen (18), inclusive, Block One (1), CATALINA PLACE. . . ." The Court viewed the debtor's property as constituting three distinct parcels: the "North" property, the "South" property, and the "Ann Clark" property (R. 283-284).

20. THE COURT: You don't seriously contend that Mr. Duecy and Mr. Fulford, through him, are just making this up.

MR. WOLFE: No, no. (T. 22-23)

the legal description set forth in the stipulation.<sup>21</sup> The Court recognized that the Chapter X proceedings involved such an enormous amount of detail that the inadvertence of the Trustee and his counsel was certainly understandable (T. 5).

**B. THE DISTRICT COURT PROPERLY RELIEVED THE TRUSTEE OF THE STIPULATION WHICH HE HAD ENTERED INTO AS A RESULT OF MISTAKE, INADVERTENCE, OR EXCUSABLE NEGLIGENCE.**

A court may relieve a party of its stipulation where the stipulation was entered into by mistake or through inadvertence or excusable neglect. In *United States v. City of Tacoma, Washington*, 330 F.2d 153 (9th Cir. 1964), this Court said that a party would be entitled to be relieved of its stipulation as to compensation for condemned land, where the stipulation was entered into under a misunderstanding as to the interest being taken. It is within the discretion of a court to disregard a stipulation entered into through inadvertence or mistake of fact. *Albee Homes, Inc. v. Lutman*, 274 F.Supp. 875 (E.D. Pa. 1965). In that case, former employers sought to recover amounts allegedly overdrawn or borrowed by a former employee. The defendant employee had stipulated that a long series of checks were properly chargeable to him. Counsel later discovered that two checks had been inadvertently included in the stipulation and the Court permitted the defendant to withdraw them from the stipulation. *Johnstone v. Bettencourt*, 16 Cal. Rptr. 6 (Dist. Ct. App. 1961). Cf. *Miller v. Schafer*, 102 Ariz. 457, 432 P.2d 585 (1967) (In Division) where the

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21. MR. WOLFE: Oh no, no. I didn't understand you. I thought you meant that they were lying. Of course I don't think they are lying.

THE COURT: I was sure you didn't.

MR. WOLFE: He probably overlooked it. I don't know what is in their minds.

Court disapproved penalizing an attorney by refusing to grant relief from a stipulation entered into through inadvertence.

The Trustee did not intend or understand that the Ann Clark property was included in the stipulation. His failure to discover that it was included was understandable in view of the close similarity in legal description between that property and the North property.<sup>22</sup> Appellant's counsel did not dispute that the Trustee had signed the stipulation by mistake or inadvertence. Indeed, he conceded that a mistake had been made. The District Court considered the Trustee's mistake to be excusable neglect in view of the enormous detail work involved in the reorganization proceedings. The controlling authorities set forth above make it clear that the District Court properly relieved the Trustee from the stipulation.

The authorities relied upon by the appellant are not determinative of the issues presented. In *Evans v. Raper*, 93 P.2d 754 (Okla. 1939) (Appellant's Opening Brief, p. 26) the plaintiff filed a motion to vacate and set aside a stipulation based upon allegations of fraud in its procurement. On appeal, the Court affirmed the trial court's holding that there was no evidence of fraud on the part of the defendants in the negotiation of the compromise settlement and procurement of the stipulation. That case is simply not relevant to the issues presented here. It did not involve mistake or inadvertence as in the instant case. Nor did the Court suggest that upon a showing of fraud, the stipulation would not have been set aside.

Similarly, *In re Brandt's Estate*, 67 Ariz. 42, 190 P.2d 497 (1948) (Appellant's Opening Brief, p. 26) is not rele-

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22. See n. 19, *supra*, where the legal descriptions of the Ann Clark property and the North property are set forth.

vant to the instant case. In that case, the appellee, who was the second wife of the decedent, petitioned the Court for a family allowance. The appellant, the decedent's executrix, filed a response to the petition wherein she attacked the validity of the marriage between the decedent and appellee on the ground that the decedent's previous divorce was void. Prior to the hearing on the appellee's petition, the parties stipulated that the Court should consider the right of the executrix to attack collaterally the validity of the divorce decree. The appellant contended that this stipulation amounted to an agreement that the only issue to be determined was whether the Court had jurisdiction to consider the validity of the divorce decree and the stipulation excluded all other issues including estoppel. The Court observed that the jurisdictional matter was only a preliminary legal question the parties intended to present under the stipulation for determination. The Court held that under its construction of the stipulation the defense of estoppel was not waived. That case involved the construction to be placed upon a stipulation. It did not involve a request to be relieved from a stipulation because of mistake and inadvertence and it is not relevant to the instant case.

**C. THE DISTRICT COURT PROPERLY RELIEVED THE TRUSTEE FROM ITS ORDER PURSUANT TO RULE 60(b) FEDERAL RULES OF CIVIL PROCEDURE.**

Rule 60(b) F.R.C.P. provides in pertinent part:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, or excusable neglect . . . . The motion shall be made within a reasonable time, and . . . not more than one year after the judgment, order, or proceeding was entered or taken.

A motion to vacate a judgment pursuant to Rule 60(b) F.R.C.P. is addressed to the sound legal discretion of the trial court and the court's determination will not be disturbed except for an abuse of discretion. *Siberell v. United States*, 268 F.2d 61 (9th Cir. 1959). In the instant case, the Trustee made a sufficient showing of excusable neglect or inadvertence which the Court found to be understandable in view of the enormous detail and complexity of the proceedings over which it had presided. See *United States v. Gould*, 301 F.2d 353 (5th Cir. 1962) where the Court of Appeals reversed the order of the District Court dismissing the Government's motion to vacate a judgment entered into by stipulation of the parties setting the amount to be paid for land taken in a condemnation action. In that case, the Government had stipulated as to the amount to be paid without further proof or litigation on the mistaken assumption that clear title was in the condemnee. It later appeared that all the land involved was subject to easements as public streets and the condemnee could not be entitled to more than nominal damages. See also *Griffin v. Kennedy*, 344 F.2d 198 (DC Cir. 1965) where the court held that the plaintiffs were entitled to relief under Rule 60(b) on ground of mistake where plaintiffs' counsel erred in admitting that plaintiffs "resided" in enemy territory throughout the war so that they were "enemies" under the Trading With the Enemy Act.

The authorities relied upon by the appellant are not determinative of the propriety of the District Court's vacation of its order. In *Federal Enterprises v. Frank Albritton Motors*, 16 F.R.D. 109 (D.C. Mo. 1954) (Appellant's Opening Brief, p. 29), the movant made no real attempt to show mistake. In the instant case, the Trustee satisfactorily showed that the stipulation was entered into because of



mistake, inadvertence and excusable neglect. Similarly, in *In re Wright*, 247 F.Supp. 648, (D.C. Mo. 1965) (Appellant's Opening Brief, p. 29) the Court held that ignorance of rules of procedure did not constitute excusable neglect. The Trustee did not rely upon ignorance of rules in moving to set aside the stipulation and order. Accordingly, that case is simply not relevant here. In *Frank v. New Amsterdam Cas. Co.*, 27 F.R.D. 258 (D.C. Pa. 1961) (Appellant's Opening Brief, p. 29) the Court held that an attorney's failure to file a timely motion for a new trial was not excusable neglect. That case is obviously not relevant here.

We agree with appellant that a District Court has wide discretion in passing upon a motion under Rule 60(b) and unless it abused its discretion, its ruling will not be disturbed on appeal. *Wojton v. Marks*, 344 F.2d 222, 225 (7th Cir. 1965); *Swam v. United States*, 327 F.2d 431, 433 (7th Cir. 1964) cert. denied 379 U.S. 852 (1964) (Appellant's Opening Brief, p. 29).

There is no merit to the appellant's unsupported assertion that the Trustee offered no proof in support of his claim of mistake or inadvertence (Appellant's Opening Brief, p. 30). The Trustee did offer proof and he did submit affidavits. Furthermore, the previous discussion shows that the Trustee had a meritorious defense to the appellant's lien claim. The appellant has not shown that it actually bargained for the inclusion of the Ann Clark property in the stipulation as part of a compromise settlement. *Hoffman v. Celebrezze*, 277 F. Supp. 482 (E.D. Mo. 1967).

There was ample justification for the District Court's exercise of discretion under Rule 60(b) to modify or set aside its order because of the Trustee's mistake, inadvertence or excusable neglect. Accordingly, there is no merit to



the appellant's contention that the District Court abused its discretion.

**D. THE APPELLANT WAIVED ITS RIGHT TO RELY ON THE STIPULATION BY ELECTING TO PROVE ITS LIEN.**

During the hearing on the Trustee's motion to set aside the stipulation and order, the appellant moved to admit the testimony and exhibits as part of the Section 197 hearings (R. 275-279). Subsequently, the appellant attempted to prove the validity of its lien against the Ann Clark property through the testimony of Mr. Magruder, its representative. The appellant's conduct was inconsistent with the stipulation and accordingly it waived any right to rely on the stipulation. *Gethsemane Lutheran Church v. Zacho*, 92 N.W.2d 905 (Minn. 1958); *Hamco Oil and Drilling Company v. Ervin*, 354 P.2d 442 (Okla. 1960); *Gorman v. Wilson*, 98 P.2d 608 (Okla. 1940).

**CONCLUSION**

Appellant's specifications of error are without basis in law or fact and the District Court's decision determining that the Ann Clark property and the proceeds from its sale are not subject to appellant's lien should be sustained.

FENNEMORE, CRAIG, VON AMMON,  
MCCLENNEN & UDALL

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*Special Counsel for Appellee*

**CERTIFICATE**

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROBERT H. CARLYN

**(Appendices Follow)**





## ***Appendix A***

### **FINDINGS OF FACT**

3. On or about April 2, 1966, by vendee's deed, the trustees herein, pursuant to an Order of this Court entered May 9, 1966, acquired the contract interest of Mayer Development Company, a partnership composed of Lawrence D. Mayer and Eric Mayer, in and to the following described property:

Lot One (1) of Block One (1) CATALINA PLACE, according to the plat of record in the office of the County Recorder of Maricopa County, Arizona, in Book 25 of Maps, page 24, together with the North half of that part of the East-West alley in said Block One lying between the Southerly prolongations of the East and West lines of said Lot One.

Said property will be referred to herein as the "Ann Clark property" since title to said property has at all times relevant to these proceedings rested in Ann Clark subject only to the contract to purchase initially held by the Mayer Development Company and subsequently conveyed as afore-said to trustee herein by vendee's deed. Prior to April 2, 1966, the debtor corporation had no interest in the Ann Clark property. Such property constitutes the northeast corner of the parking lot to the rear of the Mayer Central Building and at all material times it has been used by tenants of that building for parking purposes. (R. 284)

44. A & A Sign Company, Inc. (hereinafter referred to as "A & A Sign"), an Arizona corporation, had a contractual relationship with the debtor corporation wherein A & A Sign agreed to and did construct certain signs for the debtor corporation on both the North and South property.

Work was performed pursuant to said contract from November 5, 1964, to and including July 2, 1965.

45. A & A Sign recorded a notice and claim of mechanic's lien on September 23, 1965, claiming a lien against both the North and South property and against the Ann Clark property, and attempted to perfect said lien in accordance with A.R.S. § 33-981, et seq.

46. A & A Sign timely filed a pleading in the Superior Court of the State of Arizona in and for the County of Maricopa in Cause No. 179138, wherein it sought to foreclose said lien in accordance with the provisions of A.R.S. § 33-998, and thereafter filed a proof of secured claim in these proceedings. (R. 292)

### CONCLUSIONS OF LAW

5. Pursuant to §§ 196 and 197 of the Act of Congress Relating to Bankruptcy, hearings were held at which time evidence concerning the validity, amounts and priority of various secured claims was presented to the Court.

6. All parties in interest had an opportunity to present such evidence as they deemed material to the issues to be decided by the Court. (R. 302)

10. Valid mechanics' and materialmen's liens attach only upon the lot or lots upon which are situated the structures on which the claimant performed labor and/or furnished materials.

13. In order to perfect a valid mechanic's or materialman's lien under a given contract, a direct or original contractor must file or record his notice and claim of lien within ninety (90) days from the last date upon which such contractor performed labor or furnished materials under said contract. (R. 303)

15. The liens of Otis Elevator Company, A & A Sign Company, Bob Campbell Lath-Plaster-Drywall Systems, Inc., and Pioneer Plumbing Supply Company, to the extent valid, attach only to the debtor corporation's interest in the North property, which has heretofore been determined to be valueless. The Court has heretofore determined that all of said claims are junior and subordinate to the claims and interests of Prudential and Fifty Associates.

16. The liens of Otis Elevator Company, A & A Sign Company, Bob Campbell Lath-Plaster-Drywall Systems, Inc., and Pioneer Plumbing Supply Company, even if valid, exceed the value of their security in the amounts claimed, and each such claim should be reclassified as unsecured in its entirety. (R. 304)

32. The trustees herein, on behalf of the debtor corporation, are the owners of the vendee's interest in the Ann Clark property subject to no lien or encumbrance by any party to these proceedings. (R. 306)

**Appendix B**

A & A SIGN CO., INC., an Arizona corporation,

*Claimant,*

vs.

MAYER CENTRAL BUILDING CORPORATION, an Arizona corporation; WALTER E. FULFORD, Trustee of the Estate of Mayer Central Building Corporation, an Arizona corporation, debtor; MAYER DEVELOPMENT CORPORATION, an Arizona corporation; LAWRENCE D. MAYER and PAULINE MAYER, his wife; ERIC D. MAYER and FRANCINE MAYER, his wife; FIFTY ASSOCIATES, a Massachusetts corporation; THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, a New Jersey corporation; KIRKEBYNATUS CORPORATION OF DELAWARE, a Delaware corporation; FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF PHOENIX, a corporation; THE VALLEY NATIONAL BANK OF ARIZONA, a national banking association; THE MASTAN COMPANY, INCORPORATED, a Delaware corporation; ARIZONA REALTY, INC., a New York corporation,

*Owners or Reputed Owners,*

SOUTHWESTERN GLASS & MILLWORK CO., an Arizona corporation; CONSOLIDATED ROOFING & SUPPLY COMPANY, an Arizona corporation; J. H. WELCH & SON CONTRACTING CO., an Arizona corporation; ORA B. HOPPER & SON, INC., CONSTRUCTION & DEVELOPMENT, an Arizona corporation; GENERAL ELECTRIC SUPPLY COMPANY, a division of General Electric Company, a New York corporation; INDUSTRIAL ELECTRIC, INC., an Arizona corporation; PIONEER PLUMBING SUPPLY CO., an Arizona corporation; TECHNI-BUILDERS, INC., an Arizona corporation; COMMERCIAL DESIGNS, LTD., a Division of Rich-Len Enterprises, Inc., an Arizona corporation; THE O'MALLEY LUMBER COMPANY, an Arizona corporation; W. A. PERRY TILE AND MARBLE CO., an Arizona corporation; THE MARSTON SUPPLY CO., a partnership composed of J. N. Norris, Sr., J. N. Norris, Jr. and Edward Norris; MILTON J. LEVKOWITZ, an individual, dba Sun Wholesale Electric Company; RAY LUMBER CO., an Arizona corporation;



GUY J. QUALTIRE, an individual dba Qualtire Plumbing Co.; KLAAS BROS., INC., PAINTING CONTRACTORS, an Arizona corporation; SHALER GLASS CO., INC., an Arizona corporation; THE ALBERT SECHRIST MANUFACTURING COMPANY, also known as Sechrist Manufacturing Company, a Colorado corporation; EMPLOYMENT SECURITY COMMISSION OF ARIZONA: NUCLEAR CORPORATION of AMERICA-VALLEY SHEET METAL DIVISION, a Delaware corporation; LOUK-MEAD PLUMBING & HEATING CO., an Arizona corporation; DOE CORPORATIONS, JOHN DOE AND JANE DOE, his wife,

*Interested Parties.*

***Appendix C*****PARCEL 1**

Lots One (1) through Eighteen (18), inclusive, Block 1, Catalina Place, according to the plat of record in the office of the County Recorder of Maricopa County, Arizona, in Book 25 of Maps, Page 24 thereof.

**PARCEL 2**

All alleys in Block 1, CATALINA PLACE, according to the plat of record in the office of the County Recorder of Maricopa County, Arizona, in Book 25 of Maps, page 24 thereof, lying West of the northerly projection of the east line of Lot Two (2), Block 1, of said CATALINA PLACE.

**PARCEL 3**

All of Avalon Drive as shown on and dedicated by the plat of CATALINA PLACE, according to the plat of record in the office of the County Recorder of Maricopa County, Arizona, in Book 25 of Maps, Page 24 thereof.

**PARCEL 4**

Lots One (1) through Sixteen (16), inclusive, Block 2, CATALINA PLACE, according to the plat of record in the office of the County Recorder of Maricopa County, Arizona, in Book 25 of Maps, page 24 thereof.

**PARCEL 5**

That certain alley lying North of and adjoining the North line of Lot 12 in Block 2, CATALINA PLACE, according to the plat of record in the office of the County Recorder of Maricopa County, Arizona, in Book 25 of Maps, page 24 thereof, and the Westerly prolongation thereof, and lying between the East line of Lot 15 in said Block 2 and the Northerly prolongation of the East line of said Lot 12.

**PARCEL 6**

That part of the North and South alley adjoining the East line of Lots Fourteen (14) and Fifteen (15), and included between the Westerly prolongation of the North and South lines of Lot Thirteen (13), all in Block Two (2), CATALINA PLACE, according to the plat of record in the office of the County Recorder of Maricopa County, Arizona, in Book 25 of Maps, page 24.



No. 22650

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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No. 22650

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A & A SIGN COMPANY, INC., Appellant,

v.

REX E. MAUGHAN, Trustee of MAYER  
CENTRAL BUILDING CORPORATION, a Debtor,  
Appellee.

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

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APPELLANT'S REPLY BRIEF

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No. 22650

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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No. 22650

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A & A SIGN COMPANY, INC., Appellant,

v.

REX E. MAUGHAN, Trustee of MAYER  
CENTRAL BUILDING CORPORATION, a Debtor,  
Appellee.

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RESPONSE TO APPELLEE'S STATEMENT OF FACTS

Appellee's footnote No. 5 on page 3 of his Brief is inaccurate in that it is incomplete by virtue of the fact that the Trustee, subsequent to the date the stipulation was signed, withdrew his objection to the Appellant's claim and approved it, and no other party filed or urged any objections to the withdrawal.

Appellant would also take issue with Appellee's footnote No. 8 on page 5 of his Brief. The implication is that the Court had always viewed the debtor's property as being three separate parcels. In fact, the Ann Clark Property did not acquire any such separate status until October of 1967, when the hearings were held on the Trustee's motion to correct the stipulation.



RESPONSE TO APPELLEE'S ARGUMENT

Appellant would first take up the Appellee's contention (pages 6-10 of Appellee's Brief) that since there was no decree by the Court declaring the Ann Clark Property to have been taken by the Mayers, doing business as the Mayer Development Co., a partnership, in trust for the debtor corporation, Appellant cannot have a lien because the debtor corporation had no interest in the Ann Clark Property prior to its turnover on April 2, 1966.

Perhaps Appellant is at fault for not making this point clear in its Opening Brief, or perhaps Appellee has either failed to see or chosen to disregard the thrust of our allegation of error. It is precisely the failure of the District Court to decree such a constructive trust in its Findings of Fact and Conclusions of Law on October 20 and October 24, 1967, that we complain about. A review of the record indicates that on February 18, 1966, the Trustee, having learned that the so-called Ann Clark Property was still in the name of the Mayers, doing business as the Mayer Development Co., a partnership, filed a petition to require the Mayers to turn over the buyer's interest in that property (R. 24-31) to the debtor corporation.



The matter was referred to Vincent D. Maggiore as Referee and Special Master. On March 21, 1968, the Referee and Special Master found, *inter alia*, that the debtor corporation has both the legal and equitable right and title to the buyer's interest in the Ann Clark Property. He also prepared an order that would require Lawrence and Eric Mayer, doing business as Mayer Development Co., a partnership, to assign and deed over all their interest in that property to the debtor corporation. (R. 36-37, Appellant's Exhibit No. 4).

*Before the Court acted on the Referee's proposals*, the Mayers, doing business as Mayer Development Co., a partnership, conveyed by vendee's deed their interest in the Ann Clark Property to the debtor corporation. By their very action, the Mayers, doing business as Mayer Development Co., a partnership, acknowledged they were holding the property as trustees for the debtor corporation.

On page 9 of his Brief, the Appellee states that, "The Master's report did not establish a constructive trust" and further on page 9, "The Master's report is merely advisory and must be confirmed by the District Court to be effective."

Appellant agrees that the Referee did not specifically



use the words "constructive trust," but there can be no doubt that this was the basis of his order, and the Mayers', doing business as the partnership, immediate compliance points up this position.

Further, the very act of the Mayers, doing business as the partnership, in complying with the proposed order made a formal decree from the Court unnecessary. See BOGERT, *Trusts and Trustees*, 2d ed., Ch. 24, § 471.

It must be remembered that the Trustee began these proceedings when he filed the petition for the turnover order; that the Trustee accepted the deed in reliance on the Referee and Special Master's report and that the District Court, on May 9, 1966, approved the Trustee's acquisition of this vendee's interest (R. 284). But now the Trustee as Appellee in this matter urges that the debtor corporation had no interest in the property until April 2, 1966, when he accepted the vendee's deed from the Mayers, doing business as the partnership.

There is nothing in the record before this Court or any other Court that would indicate that anything occurred which suddenly matured a right in the Trustee to go after that property on behalf of the debtor corporation. To the contrary, as indicated on page 6 of our Opening Brief, the





use the words "constructive trust," but there can be no doubt that this was the basis of his order, and the Mayers', doing business as the partnership, immediate compliance points up this position.

Further, the very act of the Mayers, doing business as the partnership, in complying with the proposed order made a formal decree from the Court unnecessary. See BOGERT, *Trusts and Trustees*, 2d ed., Ch. 24, § 471.

It must be remembered that the Trustee began these proceedings when he filed the petition for the turnover order; that the Trustee accepted the deed in reliance on the Referee and Special Master's report and that the District Court, on May 9, 1966, approved the Trustee's acquisition of this vendee's interest (R. 284). But now the Trustee as Appellee in this matter urges that the debtor corporation had no interest in the property until April 2, 1966, when he accepted the vendee's deed from the Mayers, doing business as the partnership.

There is nothing in the record before this Court or any other Court that would indicate that anything occurred which suddenly matured a right in the Trustee to go after that property on behalf of the debtor corporation. To the contrary, as indicated on page 6 of our Opening Brief, the



Trustee learned that the Ann Clark Property had never been deeded over to the debtor corporation, and he realized that since the debtor corporation had made all the payments on the property, the property really did and always had belonged to the corporation.

The Trustee having initiated these proceedings to get the property into the debtor corporation, it would seem that he should be estopped from now claiming the debtor corporation had no interest in the property before April 2, 1966, which would be directly contrary to the Trustee's position as set forth in his petition.

To urge, as Appellee does on page 9 of his Brief, that this turnover of property was merely an exercise of the inherent equitable powers of the Bankruptcy Court and nothing more, indicates the extent to which the Appellee is willing to close his eyes to the reality of the situation in order to support his position.

APPELLANT'S RESPONSE TO APPELLEE'S ARGUMENT THAT THE DEBTOR CORPORATION DID NOT HAVE AN INTEREST IN THE ANN CLARK PROPERTY WHICH WAS SUBJECT TO APPELLANT'S LIEN

The thrust of Appellee's argument on pages 10-14, simply stated, is that a constructive trust is a procedural device and does not create any substantial rights. Taken in the



abstract, this is perhaps a correct statement; but here again the Appellee, with a narrowness of view that pervades his entire Brief, fails to follow the logic of the situation.

This creature of equity, the constructive trust, is the foundation from which the substantive relief comes. Without the relief required by equity, the substantive rights cannot come into existence and, by the same token, if equity could not require that the necessary substantive steps be taken, then equity itself would be a sterile and barren device.

Appellee cites several cases in support of his proposition that equity is a procedural device and then denominates these cases as "controlling authorities" (P. 12 of Appellee's Brief) for the proposition that Appellant's lien did not relate back to the date of acquisition of the Ann Clark Property by the Mayers, doing business as the partnership, having first said (P. 11):

"Even if a constructive trust was established by the District Court, the Debtor corporation did not acquire an interest in the Ann Clark Property until the vendee's deed was executed on April 2, 1966."

These statements fly in the face of the Referee and Special Master's report (R. 32, Appellant's Exhibit No. 4)



to the effect that "the debtor corporation has both the legal and equitable right and title to the buyer's interest in said agreement" (R. 36) and to the following legal principle as set forth by BOGERT, the leading textbook on the subject of trusts:

"The results of the decisions seem to show, however, *that when the wrongful holding of the property interest begins the wronged party has a cause of action to obtain a constructive trust* which is usually alternative to another remedy at law or equity, that the constructive trust is created by court decree, establishing the trust, but that when created, *the court regulates the rights of the parties as if the trust had been in existence from the date of the wrongful acquisition. The law-created trust relates back to the time of the wrong and makes the rights of the original parties and their successors in interest the same as would have been the rights of Cestui and Trustee of an express trust and their successors.*" *Trusts & Trustees*, 2d ed., Ch. 24, § 472.

In *MacRae v. MacRae*, 37 Ariz. 307, 294 Pac. 280, is this definition of a constructive trust:

"A constructive trust is one which does not arise by agreement or from the intention of the parties, but by operation of law, and fraud, actual or constructive, is an essential element thereto."

And in *Eckert v. Miller*, 57 Ariz. 92, 111 P.2d 60, the Arizona Supreme Court cited with approval the following language from POMEROY on *Equity Jurisprudence*:

"In general, whenever the legal title to property, real or personal, has been obtained





through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weakness or necessities, or through any other similar means or under any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have had any legal estate therein."

And in *Markel v. Phoenix Title & Trust Co.*, 100 Ariz.

53, 410 P.2d 662:

"A constructive trust expresses the idea that a defendant is under an equitable duty to give the complainant the benefit of property held. A wrongful holding begs relief whether the type of injustice is old or new regardless of whether actual fraud exists."

Based on all of the foregoing, Appellant again urges that under the Referee and Special Master's report (R. 32, Appellant's Exhibit No. 4), the Mayers', doing business as the partnership, prompt compliance with that report, the acceptance of the vendee's deed by the Trustee, and the approval thereof by the District Court, the Trustee's interest in the Ann Clark property dates back to the original contract of sale between Ann Clark and the Mayers, doing business as the partnership (R. 24-31, Appellant's Exhibit No. 3).



APPELLANT'S RESPONSE TO APPELLEE'S ARGUMENT  
THAT A VENDEE'S INTEREST IN REAL PROPERTY IS  
NOT SUBJECT TO A MATERIALMEN'S LIEN IN ARIZONA

While blatantly ignoring the applicable Arizona law, which is controlling, the Appellee, on pages 14-16, takes a tour through the Fifth Circuit, Texas and Indiana to find cases that support his theory. Rather than repeat the quotations from the Arizona cases which support Appellant's theory that a materialmen's lien will attach to an estate in land that is less than fee simple in the State of Arizona, Appellant will merely list the controlling cases again and refer this Court to the quotes and arguments on pages 13-17 of Appellant's Opening Brief, all of which hold that such an interest is subject to the lien:

*Demund Lumber Co. v. Franks*,  
40 Ariz. 461, 14 P.2d 256;

*Ernst v. Deister*, 42 Ariz. 379, 26 P.2d 648;

*City of Phoenix v. State, ex rel., Harless*,  
60 Ariz. 369, 137 P.2d 783;

*Pinkerton v. Pritchard*,  
71 Ariz. 117, 223 P.2d 933;

*Mills v. Union Title Co.*,  
101 Ariz. 297, 419 P.2d 81.



APPELLANT'S RESPONSE TO APPELLEE'S ARGUMENT  
THAT APPELLANT FAILED TO PERFECT ITS LIEN  
AND PROVE THAT IT HAD PROVIDED LABOR AND MATERIAL

The Appellant respectfully calls the Court's attention to the following sequence of events:

In the fall of 1967, the Appellee filed a motion to correct the Stipulation of February 20, 1967. The correction was to take the form of deleting the Ann Clark Property therefrom. This was the only point urged by the Appellee. No other aspect of the Stipulation was questioned. (R. 256-263).

On October 9, 1967, arguments on the Appellee's motion were heard, and the District Court took the motion under advisement.

Immediately thereafter, Appellant moved to have the testimony taken on October 9, 1967, incorporated into the Rule 197 hearings which had been previously held.

At the hearing held on October 18, 1967, the Court took Appellant's motion to incorporate the testimony of October 9 into the 197 hearings under advisement pointing out that Appellant, in relying on the Stipulation of February 20, 1967, had not deemed it necessary to participate in the 197 hearings and that the motion to correct the



Stipulation was not brought until after the 197 hearings had been conducted. (Transcript of Proceedings, Appellant's Exhibit No. 6, P. 44, lines 14-25).<sup>1/</sup>

Subsequently on October 20, 1967, further hearings were held; and at the conclusion of the hearings, the *District Court without actually ruling, indicated what his ruling would be.* (Transcript of Proceedings, Appellant's Exhibit No. 6, pages 79-81). (Emphasis supplied).

Thereafter, the District Court entered its Findings of Fact, Conclusions of Law and Order determining objections to the allowance of creditor's claims. (Appellant's Exhibits 7, 8 and 9).

While the District Court did, indirectly, rule on the Appellee's motion to correct the Stipulation of February 20, 1967 (see Finding of Fact No. 3 and Conclusions of Law

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<sup>1/</sup> Q (By the Court) As I gather it, you wanted to incorporate these hearings that were held on October 9, 1967, and make them part of the 197 hearings, because I believe it was your contention that when you entered into the stipulation you believed it was unnecessary, from that, to present any further testimony with respect to whether or not work had been done by the A & A Sign Company on that northeast property, Ann Clark property, and having found out that there was an objection to that stipulation on the grounds of mutual mistake, you felt that this testimony should be incorporated and made a part of the 197 hearings?

A (Mr. Wolfe) That is right.





No. 15 and 16 in Appellant's Exhibit 7), the District Court did not at that time nor at any time subsequent thereto rule on Appellant's motion to have the hearings of October 9, 18 and 20 (Appellant's Exhibit No. 6) included as part of the Rule 197 hearings.

In WIGMORE ON EVIDENCE, 2d ed., § 19, p. 191, it was said:

"A ruling reserved and never rendered upon an offer objected to and left pending, is, therefore, equivalent to a ruling of exclusion. [Citing cases]."

This being the case, then all of the testimony contained in the Transcript of Proceedings, Appellant's Exhibit No. 6, that pertains to anything but the arguments of the Appellee's motion to correct the Stipulation of February 20, 1967, is irrelevant and not material to this appeal.

It is, therefore, Appellant's position that since no other portion of the Stipulation of February 20, 1967, was attacked by the Appellee, the only issue properly before this Court is whether or not the lien stipulated to by the parties to the appeal attaches to the Ann Clark Property. It is interesting to note that at the hearing held on October 9, 1967, Mr. Duecy, the attorney for the Appellee, had no doubt as to the validity of Appellant's lien



and did not even believe that to be in dispute. He was only concerned with correcting the Stipulation so as to remove the Ann Clark Property from its effect based upon his unilateral mistake. This is made quite clear on pages 35 through 41 of Appellant's Exhibit No. 6.<sup>2/</sup>

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2/ (Mr. Duecy) No, I am merely saying--please, Mr. Wolfe, I am not arguing the merits of the case. You brought this up, and I am very sympathetic towards your cause. All I am saying is we made a mistake, and I want the mistake corrected. You will probably still get the money, but I still want the mistake corrected. That sizes it up. (p. 35 line 24 through p. 36 line 4).

(Mr. Duecy) Because he has filed a lien, and I don't believe that anybody has challenged his lien on the North property. (p. 37 lines 11-13).

(Mr. Duecy) We are not questioning the lien--

(The Court) Mr. Duecy, just a moment. The point is that there is a record that has been made, in any case. The record I suppose might be determined that you have a lien anyway, when we get to that point of the final findings of fact and conclusions of law, irrespective of this stipulation and order.

That's all I am saying. Let's see what happens with respect to that, and if that settles the matter, that will resolve it.

If not, then I will have to make the decision as to whether or not the stipulation and order are binding, or not.

(Mr. Duecy) Your Honor, I think the problem Mr. Wolfe is faced with does not concern itself with this stipulation.

It concerns itself primarily with whether the trustee owned the property at the time that the lien was filed.

In other words, whether this turnover order was nunc pro tunc, and if we had, as you claimed, Sidney, the right, equitable, real, and legal title to that property, then I don't think that there is any question but what his lien attached. (p. 39 lines 3-24)



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2/ (Continued)

(Mr. Duecy) If we owned the property, then I think his lien is good without a stipulation.

If we didn't own the property, we can't stipulate ourselves into ownership, Your Honor.

(Mr. Wolfe) All I can respond to that is that there is an order of the Court that says that the debtor corporation at all times owned the equitable and legal title, and compelling these people to convey it.

(The Court) Is this the Referee's order?

(Mr. Wolfe) Yes.

(The Court) Or mine?

(Mr. Wolfe) I don't know what your order said. I am sure it was probably fairly similar to that.

(Mr. Duecy) The referee and special master, his order.

There is no objection (p. 40 line 24 through p. 41 line 14).



Appellant urges that the basic issue to be determined is whether or not the lien that Appellant and Appellee stipulated to on February 20, 1967, attaches to the Ann Clark Property.

APPELLANT'S RESPONSE TO APPELLEE'S ARGUMENT  
THAT THE DISTRICT COURT PROPERLY RELIEVED  
THE APPELLEE OF THE EFFECTS OF THE  
STIPULATION AS TO THE ANN CLARK PROPERTY

It is most interesting to note that nowhere in Appellee's Brief does he attempt to refute our argument that in situations involving unilateral mistake, the general rule is that relief will be denied to the mistaken party unless the other party can be put back in status quo. CORBIN ON CONTRACTS, Vol. 3, Ch. 28, § 606.

The fact that this is, at best, a situation of unilateral mistake is shown on page 24, lines 6-16 (Appellant's Exhibit No. 6) wherein counsel for Appellant made the following statement to the Court:

"Mr. Wolfe: No, I'm not saying that, Your Honor. I am saying that I knew that there had been a turnover order made in this case. I am talking about me, personally. I know personally that there had been a turnover order entered as to the Ann Clark Property.

"I also knew from my experience in this case that the Prudential Mortgage, and the Fifty Associates Mortgage did not cover it.





"I also knew that my client had done work on this property, and that therefore he was probably the only one that had a lien as to it."

There was no inadvertence or mistake on Appellant's part. Appellee, in attempting to support his position that the District Court was correct in finding inadvertence and mistake on his part, cites *Miller v. Schafer*, 102 Ariz. 457, 432 P.2d 585, as a case "where the court disapproved penalizing an attorney by refusing to grant relief from a stipulation entered into through inadvertence." (p. 33 of Appellee's Brief). Unfortunately, Appellee failed or neglected to quote all of what was said by the Arizona Supreme Court. The actual quote is:

"We are not inclined to penalize an attorney who makes an inadvertent stipulation which he discovers and tries to correct *before any damage has been done.*" *Miller v. Schafer, supra* (emphasis supplied).

In the case at bar, "the damage" in the form of the release of lien as to the so-called South Property, was effected long before the Appellee attempted to correct the stipulation. (See Appellant's Exhibit No. 2). The fact is that Appellant had substantially changed its position in reliance on the stipulation and cannot now be returned to the status quo of February, 1967.



Appellant would reaffirm his position that the Appellee failed to meet the burden of proof that was his. "It is essential in order to obtain a decree rescinding or reforming a written conveyance, contract, assignment or discharge for mistake, that the facts necessary for the allowance of the remedy *shall be proved by clear and convincing evidence and not by a mere preponderance.*" (emphasis supplied). RESTATEMENT, CONTRACTS, § 511. Appellant urges that on the record Appellee failed to carry this burden of proof.

However, even assuming, arguendo, that they had carried this burden of proof, they are still estopped by virtue of the fact that Appellant had changed its position in reliance on the stipulation and cannot be restored to its original position.

The last point Appellee makes is that Appellant waived its right to rely on the stipulation by electing to prove its lien at the hearings held on October 18 and 20, 1967. In support of this contention, Appellee cites *Gorman v. Wilson*, 98 P.2d 600 (Okla. 1940), and *Hamco Oil & Drilling Co. v. Ervin*, 354 P.2d 442 (Okla. 1960). Appellee states on p. 37 of his Brief that:



"Subsequently the Appellant attempted to prove the validity of its lien against the Ann Clark Property through the testimony of Mr. Magruder, its representative. The Appellant's *conduct* was inconsistent with the stipulation and accordingly it waived any right to rely on the stipulation." (emphasis supplied by Appellant).

Unfortunately this is not the rule laid down in these cases. The cases cited by Appellee do stand for the proposition that where a party relying on a stipulation introduces evidence *inconsistent* with that stipulation, then he has, to that extent, waived the stipulation. This is a far cry from Appellee's theory of the cases. The fact is that the entire transcript of the hearings of October 9, 18 and 20, 1967 (Appellant's Exhibit No. 6), is replete with the testimony of Mr. Magruder in support of the validity of the stipulation and the lien, and his testimony was not in any way inconsistent with the stipulation.



### CONCLUSION

The District Court erred in finding that the Ann Clark Property and the proceeds of its sale are free from the Appellant's lien.

Respectfully submitted,

/s/ Sidney B. Wolfe

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Irwin Harris  
Of Counsel

### CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Sidney B. Wolfe

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Sidney B. Wolfe





AFFIDAVIT OF SERVICE BY MAIL

SIDNEY B. WOLFE, being duly sworn, says that he deposited three (3) copies of the foregoing Appellant's Reply Brief in final printed form in the United States Post Office in the City of Phoenix, State of Arizona, enclosed in an envelope duly addressed to Mr. Charles M. Duecy, Suite 1, 101 East Fourth Street, Scottsdale, Arizona 85252, with postage fully prepaid; he further states that he deposited twenty (20) copies in the United States Post Office in the City of Phoenix, State of Arizona, duly addressed to the Office of the Clerk, U. S. Court of Appeals for the Ninth Circuit, San Francisco, California 94101.

Both mailings were made on the 29th day of July, 1968.

/s/ Sidney B. Wolfe

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Sidney B. Wolfe

Subscribed and sworn to before me  
this 29th day of July, 1968.

/s/ Catherine F. Howard

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Notary Public

My commission expires  
September 29, 1971.

[SEAL]



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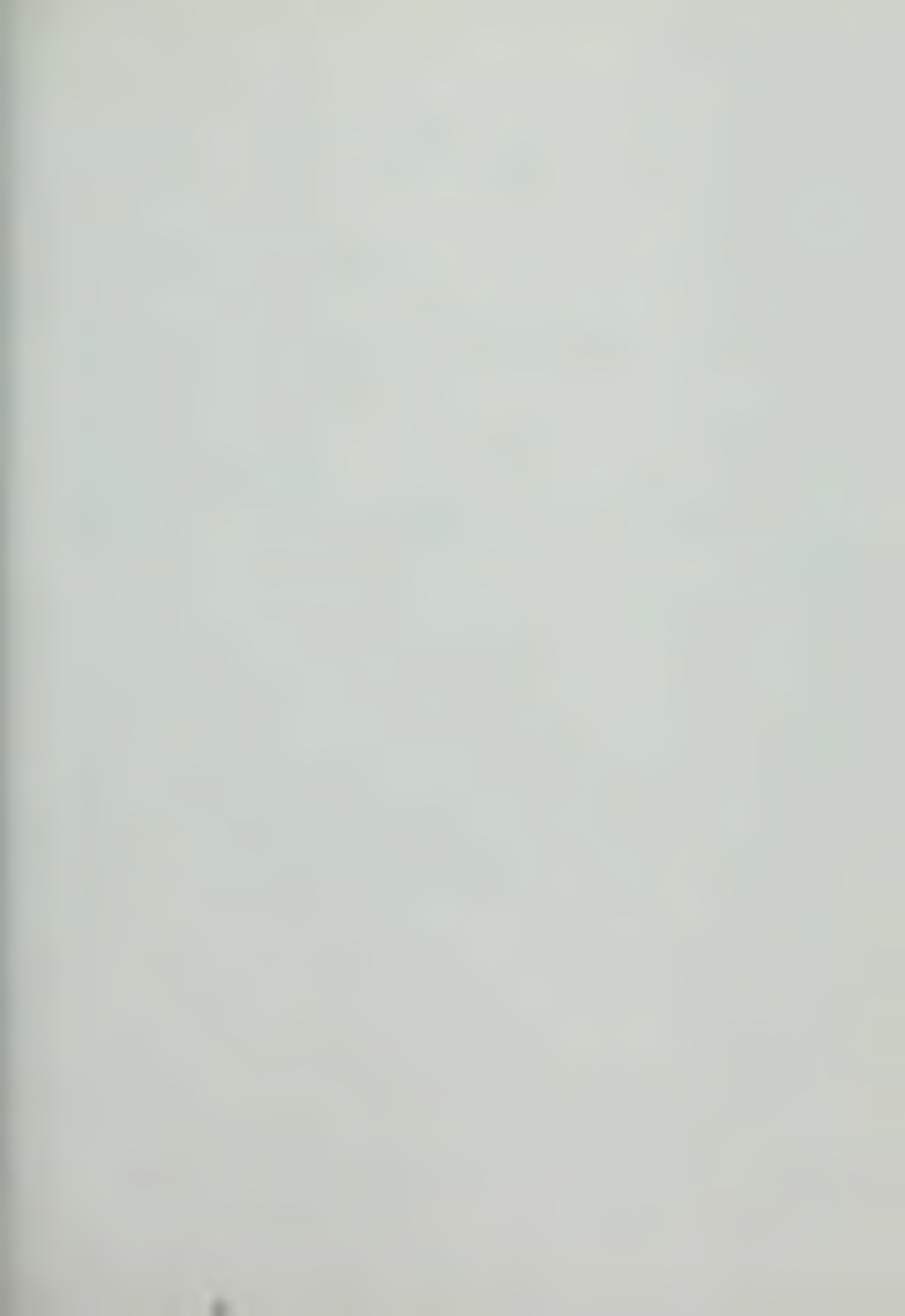
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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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No. 22650 A & B

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APPELLANT'S OPENING BRIEF

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STATEMENT OF JURISDICTION

This appeal is brought and the Court's jurisdiction invoked pursuant to Title 11, § 47 of the United States Code Annotated.

NATURE OF THE CASE

This case arises out of a stipulation entered into between the Appellant and the Trustee establishing and affirming certain lien rights of the Appellant and the order of court approving said stipulation at a Section 197 Hearing and the subsequent order of court setting aside the stipulation and previous order pursuant to motion by Trustee.

Specifically, the matters forming the subject of this appeal are a series of Findings of Fact, Conclusions of Law, and Orders made by The Honorable C. A. Muecke on



October 20 and October 24, 1967, which affected substantial rights of the Appellant.

STATEMENT OF ISSUES ON APPEAL

1. At what point in time did the debtor corporation, MAYER CENTRAL BUILDING CORPORATION, acquire the vendee's interest in the "Ann Clark" Property?

2. Is the vendee's interest in real property it is purchasing by a contract of sale subject to a labor and materialmen's claim of lien?

3. From the date of its filing on September 23, 1965, to date, was and is the Labor and Materialmen's Lien of A & A SIGN COMPANY, INC., a valid and subsisting lien, claim and encumbrance on and against the debtor corporation's interest as vendee in the "Ann Clark" Property and/or the proceeds of the sale of the "Ann Clark" Property?

4. Is the Stipulation of February 21, 1967, between A & A SIGN COMPANY, INC., and Walter Fulford as Trustee of the bankrupt corporation a valid and enforceable agreement?

5. If said Stipulation is a valid and enforceable agreement, does the court have jurisdiction to set the same aside, or is it an abuse of discretion to set it aside?



lien or encumbrance by any party to these proceedings.

6. Supplemental Finding of Fact No. 97 - dated October 24, 1967, wherein the lower court found that the estate of the debtor corporation did not have sufficient assets to satisfy the claims of secured creditors in full and has no assets available for distribution to general creditors and stockholders.

(a) As to the lower court's order of October 24, 1967, determining objections to the allowance of creditor's claims, determining the value of security subject to the claims of secured creditors and classifying creditors and stockholders.

(b) No. 8 on page 5, wherein the lower court finds that the debtor corporation owns the "Ann Clark" Property and any funds which are or may be generated from the sale of said property are free and clear of all liens or encumbrances by any party to those proceedings.

(c) No. 10 on page 5 - wherein the lower court found that the claim of lien of A & A SIGN COMPANY, INC., even if otherwise valid, exceeds the value of its security in its entirety and such claim is hereby classified as unsecured.



## STATEMENT OF FACTS IN APPEALS

Beginning on November 5, 1964, and continuing through June 28, 1965, the Appellant herein performed certain work and furnished certain materials in the alteration, construction and erection of certain buildings and improvements now upon that real property situated in the City of Phoenix, County of Maricopa, State of Arizona, more particularly described in the liens filed by Appellant (Appellant's Exhibit No. 1).

That the reasonable value of said work and materials furnished was in the sum of \$21,793.28 and that said work was performed by Appellant as a direct contractor for the owner of said premises; that notice and claim of lien was properly filed and recorded in the office of the County Recorder of Maricopa County, Arizona, on September 23, 1965, and within the time allowed by Arizona Statute and properly served upon the owners of the premises (See Appellant's Exhibit No. 1).

That on October 1, 1963, Ann Louise Clark entered into a contract of sale of real property with the Mayer Development Company, a partnership consisting of Lawrence D. Mayer and Eric D. Mayer whereby Ann Louise Clark sold to Mayer Development Company that certain real property





described in said Agreement for Sale (Appellant's Exhibit No. 3).

That subsequent to the proceedings in bankruptcy of the Mayer Central Building Corporation, it was learned that the Mayer Development Company, a partnership, had failed and neglected to deed over this so-called "Ann Clark" Property to the Mayer Central Building Corporation; that on March 15, 1966, a hearing was held before The Honorable Vincent D. Maggiore, Referee and Special Master (see Appellant's Exhibit No. 4).

That the Findings of Fact of the Referee and Special Master included, *inter alia*, that all the payments for the "Ann Clark" Property were made by the debtor corporation (Mayer Central Building Corporation); that the improvements on this property were installed and paid for by the debtor corporation.

That the Mayer Development Company has failed to deed or assign the buyer's interest in the said property to the debtor corporation.

That the Conclusions of Law of the Referee and Special Master included, *inter alia*, that the debtor corporation has both the legal and equitable right and title to the buyer's interest in the "Ann Clark" Property.



That the order of the Referee and Special Master required, *inter alia*, that the Mayer Development Company, a co-partnership, execute and record a deed and assignment of all their right, title and interest in the "Ann Clark" Property to the debtor corporation.

This order of the Referee and Special Master was complied with immediately thereafter on April 2, 1966.

On February 21, 1967, at a Section 197 Hearing, Appellant and Trustee for the debtor corporation entered into a stipulation, and The Honorable C. A. Muecke signed an order pursuant thereto wherein the lien of the Appellant was affirmed as to the so-called "South" and "North" Property of the debtor corporation. The "North" Property included the "Ann Clark" Property by legal description (See Appellant's Exhibit No. 5). Contemporaneously with this stipulation and order and as consideration for the stipulation, the Appellant had executed a partial release of lien as to the so-called "South" Property of the debtor corporation in consideration of receiving \$7,500 (See Appellant's Exhibit No. 2).

The stipulation and order also contained, in summary, the following:

That the materialmen's lien filed by Appellant was a



valid and subsisting one, properly filed, recorded and served and that the Trustee withdrew any objections to the claim of Appellant both as to amount and security.

In the late summer of 1967, the Trustee moved the court to be allowed to correct his stipulation with Appellant by deleting the legal description of the "Ann Clark" Property therefrom, claiming as his reason therefor inadvertence and mistake on his part. Subsequently evidence was taken and argument was had on the Trustee's motion; and on October 20, 1967, The Honorable C. A. Muecke, in his Findings of Fact and Conclusions of Law, sustained the Trustee's contention and went even further by finding that prior to April 2, 1966 (the date the Mayer Development Company, as co-partnership, deeded the "Ann Clark" Property over to the debtor corporation), the debtor corporation had no interest in the "Ann Clark" Property. It should be noted that the Trustee's position was sustained indirectly in that nowhere in the Findings of Fact and Conclusions of Law of October 20, 1967, and October 24, 1967, does the court find mistake or inadvertence as claimed by the Trustee, but rather the Appellant's lien claim is denied on the basis that the "Ann Clark" Property was not in the debtor corporation at the time of the



filing of Appellant's materialmen's claim of lien and that the "Ann Clark" Property is still to be treated as a separate parcel of property rather than as part of the "North" Property.

#### SUMMARY OF ARGUMENT

It is Appellant's position that:

1. Under the doctrine of Constructive Trust, the debtor corporation's interest in the "Ann Clark" Property relates back to the date the Mayer Central Development Company, a partnership, first contracted to purchase the property from Ann Clark, that is to say, October 1, 1963.

2. The vendee's interest in real property being purchased under a contract of sale is subject to a materialmen's and laborers' lien.

3. The lien notice filed by A & A SIGN COMPANY, INC., the Appellant herein, was in substantial compliance with Arizona law.

4. The stipulation between the Appellant and the Trustee was a valid and enforceable contract and was not entered into inadvertently by the Trustee, and that the Trustee wholly failed to make an evidentiary showing of inadvertence or neglect.





STATEMENT OF APPELLANT'S POINTS AND AUTHORITIES

I

At what point in time did the debtor corporation, Mayer Central Building Corporation, acquire the vendee's interest in the "Ann Clark" Property?

Simply stated, it is Appellant's position that the debtor corporation's interest in the "Ann Clark" Property relates back to the purchase agreement (Appellant's Exhibit No. 3) between Ann Clark and the Mayer Development Company, a partnership, on October 1, 1963. This contention is based on the theory that at the time of the consummation of this agreement, the Mayer Development Company, a partnership, took the vendee's interest in Constructive Trust for the debtor corporation. It is clearly pointed out in Appellant's Exhibit No. 4, the report of the Referee and Special Master, that the debtor corporation made all the payments on the "Ann Clark" Property and, therefore, the vendee's interest properly belonged in the debtor corporation. While not spelled out, it is obvious that the Referee's and Special Master's findings were bottomed on the fact that it would have been a constructive fraud against the debtor corporation and unjust enrichment to the Mayer partnership to allow



the vendee's interest to remain with the Mayer Development Company, a partnership.

"A Constructive Trust may be defined as the device used by Chancery to compel one who unfairly holds a property interest to convey that interest to another to whom it justly belongs."

BOGERT, *Trusts & Trustees*, 2d Edition, Chapter 24, § 471 (citing cases).

"There must be some fraudulent or unfair and unconscionable conduct rendering it inequitable for the Trustee to retain title in order to create a constructive trust, but a constructive trust may be imposed to prevent unjust enrichment without regard to actual fraud."

C.J.S. *Trusts*, § 139, pp. 1021-23.

"In order that fraud or other wrongdoing may give rise to a constructive trust, it must exist at the inception of title to the property or inhere in the transaction by which the Trustee acquires title."

C.J.S., *supra* (citing cases).

"The results of the decisions seem to show, however, that when the wrongful holding of the property interest begins, the wronged party has a cause of action to obtain a constructive trust which is usually alternative to another remedy at law or equity, that the constructive trust is created by Court decree establishing the trust, but that when created, the court regulates the rights of the parties as if the trust had been in existence from the date of the wrongful acquisition. The law-created trust relates back to the time of the wrong and makes the rights of the original parties and their successors in interest the same as would have been the rights of Cestui and Trustee of an express trust and their successors." (Emphasis supplied).

BOGERT, *supra*, § 472.



Also, see *Markel v. Phoenix Title & Trust*, 100 Ariz. 53, 410 P.2d 662, and *Linder v. Lewis, Roca, et al*, 85 Ariz. 118, 333 P.2d 286; and in *Smith v. Connor*, 87 Ariz. 6, 347 P.2d 568, the Arizona Supreme Court affirmed the general rule that a constructive trust is declaratory of the rights and interests at the time of the questioned transaction, and it reverts back to the time of the transaction which gave rise to the constructive trust. This statement of law is implicit in the Referee's and Special Master's report.

"If as is often the case, the defendant has received income or other benefits from the property since the date of his wrongful acquisition of it and has made expenditure on account of the property, the benefit of which will inure to the complainant, the Court will decree an accounting so that the defendant may receive the appropriate debits and credits." BOGERT, *supra*, § 472 (citing cases).

Based on the foregoing, it is clear beyond dispute that the Mayer Development Company, a partnership, took the vendee's interest in the "Ann Clark" Property, as Trustee of a constructive trust for the Mayer Central Building Corporation and that the Mayer Central Building Corporation has always had the vendee's interest in the property. The Findings of Fact and Conclusions of Law (Appellant's Exhibit No. 4) of the Referee and Special



Master can lead to no other conclusion.

Therefore, Appellant urges that the court below committed material and reversible error when, in its Findings of Fact dated October 20, 1967, page 3, lines 23 and 24 thereof, it stated: "Prior to April 2, 1966, the debtor corporation had no interest in the Ann Clark Property."

## II.

Is a vendee's interest in real property it is purchasing by a contract of sale subject to a labor and materialmen's claim of lien?

The authorities and cases in this particular area answer this question with a resounding "Yes."

In *Staley v. Woodruff*, 257 Ala. 571, 60 So. 2d 384, it was held that a contract between a materialman and a vendee of real property under an executory contract of sale was a contract with the "owner" of the real property for purposes of establishing a lien on the vendee's interest in the real property.

In *Creson v. Main*, 260 Ala. 318, 70 So. 2d 417, the Alabama Supreme Court upheld a lien against a purchaser's interest in real property to the extent of that interest and said there was no requirement of service of notice





upon the grantor as a condition to fastening a lien upon the interest of the grantee. In *Woods v. Deckelbaum*, 178 N.E.2d 544, the Indiana high court upheld the validity of a mechanic's lien against the interest of a vendee in real property while excluding the vendor's interest from such claim of lien.

And in *Blanton v. Owen*, 203 Va. 73, 122 S.E.2d 650, the Virginia Supreme Court affirmed a mechanic's lien against the vendee's interest in real property.

WEST'S California Code of Civil Proceedings, § 1183.1, specifically provides for mechanic's and materialmen's liens to attach to estates in land that are less than fee simple.

In Arizona, materialmen's lien attaches to the extent of the debtor's interest in the land.

In *C.J.S. Mechanic's Liens*, § 16, Vol. 57, p. 511, the author writes:

"Although there is authority to the contrary, ordinarily a mechanic's lien may attach to an equitable estate or interest in land unless the title is held under some condition which prohibits the owner of the equitable interest from placing a lien thereon. The interest of one who is in possession of land under a contract of purchase and who erects a building or other improvement thereon is subject to the lien." (Citing cases).



The applicable Arizona statute is A.R.S. 33-981, and it reads as follows:

"A. Every person who labors or furnishes materials, machinery, fixtures or tools in the construction, alteration or repair of any building, or other structure or improvement whatever, shall have a lien thereon for the work or labor done or materials, machinery, fixtures or tools furnished, whether the work was done or articles furnished at the instance of the owner of the building, structure or improvement, or his agent."

"B. Every contractor, sub-contractor, architect, builder or other person having charge or control of the construction, alteration or repair, either wholly or in part, of any building, structure or improvement, is the agent of the owner for the purposes of this article, and the owner shall be liable for the reasonable value of labor or materials furnished to his agent."

Arizona has long recognized that a mechanic's and materialmen's lien will attach to an estate in land that is less than fee simple. In *Demund Lumber Co. v. Franks*, 40 Ariz. 461, 14 P.2d 256, the Arizona Supreme Court affirmed a materialmen's lien as against a lessee's interest in real property stating:

"It is undoubtedly the law in Arizona that only the interest of the party who causes the building to be erected or the materials to be furnished can be ordered sold to satisfy mechanics' or materialmen's liens, and where the owner of the premises has leased them, a person furnishing



material or doing labor for the lessee on the premises may have a lien against the particular estate of the lessee. . . ."

Also, see *Ernst v. Deister*, 42 Ariz. 379, 26 P.2d 648.

*City of Phoenix v. State ex rel. Harless*, 60 Ariz.

369, 137 P.2d 783, involved, *inter alia*, the right of a mortgagee in possession of realty to sign petitions of annexation under a city ordinance annexing certain county areas into the City of Phoenix.

In defining the word owner, the court said:

"The word *owner* has no technical meaning, but its definition will contract or expand according to the subject matter to which it is applied. As used in statutes it is given the widest variety of construction, usually guided in some measure by the object sought to be accomplished in the particular instance. It has lead some Courts to declare that the word has no precise legal signification and may be applied to any defined interest in real estate. It is true the legal title to these parcels of real estate had not yet passed to the purchaser, yet they were in possession, exercised dominion over them, could rent or lease them, paid the taxes, and to the extent of these payments at least were the equitable owners. 'After the execution of the contract,' to use the language of the Court in *Williamson v. Neeves*, 94 Wis. 656, 69 N.W. 806, 809, 'The vendee must be regarded as the real owner of the property, though not the holder of the legal title.'" (Emphasis supplied).

Also, see *Pinkerton v. Pritchard*, 71 Ariz. 117, 223 P.2d 933.



Thus, when the language of *City of Phoenix, supra*, to the effect that the word "owner" is to be construed according to the objective sought, is examined in the light of the cases indicating the materialmen's lien statute is remedial in nature and to be liberally construed (see *Peterman-Donnelly Engineer v. First National Bank of Arizona*, 2 Ariz. App. 321, 408 P.2d 841, and *Ranch House Supply Corp. v. Van Slyke*, 91 Ariz. 177, 370 P.2d 661), and when the other authorities in this area are added, it is then quite evident that a materialmen's lien does, in the State of Arizona, attach to the vendee's interest in real property and more particularly that the lien of the Appellant did attach to the bankrupt corporation's interest in the so-called "Ann Clark" Property.

The Arizona Supreme Court has gone even further to hold that the vendor's interest is subject to the lien if the vendee is required to construct the improvements. *Mills v. Union Title Co.*, 101 Ariz. 297, 419 P.2d 81 (1966).

### III.

Appellant would next address himself to the validity of the materialmen's and laborers' lien that it filed against the debtor corporation on September 23, 1965.





The applicable Arizona Statutes read as follows:

A.R.S. 33-981:

"A. Every person who labors or furnishes materials, machinery, fixtures or tools in the construction, alteration or repair of any building, or other structure or improvement whatever, shall have a lien thereon for the work or labor done or materials, machinery, fixtures or tools furnished, whether the work was done or articles furnished at the instance of the owner of the building, structure or improvement, or his agent."

"B. Every contractor, sub-contractor, architect, builder or other person having charge or control of the construction, alteration or repair, either wholly or in part, of any building, structure or improvement, is the agent of the owner for the purposes of this article, and the owner shall be liable for the reasonable value of labor or materials furnished to his agent."

A.R.S. 33-993:

"In order to impress and secure the lien provided for in this article, every original contractor, within ninety days, and every other person claiming the benefits of this article, within sixty days after the completion of a building, structure or improvement, or any alteration or repair thereof, shall make duplicate copies of a notice and claim of lien and file one copy with the county recorder of the county in which the property or some part thereof is located, and within a reasonable time thereafter serve the remaining copy upon the owner of the building, structure or improvement, if he can be found within the county. The notice and claim of lien



shall be made under oath by the claimant or some one with knowledge of the facts, and shall contain:

1. A description of the lands and improvements to be charged with a lien, sufficient for identification.
2. The name of the owner or reputed owner of the property concerned, if known, and the name of the person by whom the lienor was employed or to whom he furnished materials.
3. A statement of the terms, time given and condition of the contract, if it is oral, or a copy of the contract, if written.
4. A statement of the lienor's demand, after deducting just credits and offsets."

An examination of Appellant's Exhibit No. 1, the Notice and Claim of Labor and Materialmen's Lien, shows that there has been, at the very least, substantial compliance with the requirements of A.R.S. 33-993(1-4).

1. There is a concise and accurate legal description of the land sought to be charged with the lien (including this "Ann Clark" parcel).

2. The names of the owners and reputed owners are also clearly set forth as well as the fact that it was the debtor corporation, Mayer Central Building Corporation, that caused the improvements to be constructed.

3. The Arizona Supreme Court, as well as the Arizona



Court of Appeals, have on several occasions construed the meaning of Section 3 of A.R.S. 33-993.

In *Lanier v. Lovett*, 25 Ariz. 54, 213 Pac. 391, the defendant in an action to foreclose a mechanic's lien asserted:

"That the contract set out in the notice of lien does not meet the requirements of this statute in that it does not state what labor was to be performed or material furnished and further that the notice itself is defective in not itemizing such material and labor."

The Court's answer was:

"It seems to us the contract as stated is not open to serious criticism since it embraces all work and material to a completed job of plumbing. The omission in the notice of lien to itemize the different articles that went into the job and the days of labor consumed in placing them, may be excused on the theory that they were not under the contract between the contractor and plaintiff to be paid as furnished or rendered but as a whole."

Also see *Leeson v. Bartol*, 55 Ariz. 160, 99 P.2d 485, which further affirms the proposition that a substantial compliance is all that is necessary to secure the lien under A.R.S. 33-993.

"The purpose of the requirements of A.R.S. 33-993 is to give the property owners an opportunity to protect themselves and time to investigate the claim and determine whether it is a proper



charge and lien statutes being remedial are to be liberally construed. Substantial compliance not inconsistent with the legislative purpose is sufficient.

If we were to require more than substantial compliance, we would be inviting an absurdity. Construction contracts, typically, are lengthy documents. Specification plans and general conditions are usually incorporated and made part of the contract. To require that an exact copy of such a contract be recorded and served would impose an unreasonable burden on those asserting lien claims as well as on the county recorders and would serve no useful purpose. Further, the parole evidence rule notwithstanding, few contracts for construction are unaffected by oral modifications. A strict reading of the statute, then, would omit these portions of the agreement between the parties. We hold that substantial compliance with the requirement that a . . . copy of the contract . . . be included in the notice is sufficient."

*Peterman-Donnelly Eng. & Construction Corp.  
v. First National Bank of Arizona,  
2 Ariz. App. 321, 408 P.2d 841.*

The *Peterman* case, *supra*, involved, *inter alia*, defendant's assertion that the failure of the lien claimant to fully set out the terms of the contract meant the claimant had failed to comply with A.R.S. 33-993 and, therefore, had not perfected his lien.

The Court, in *Peterman*, went on to say:

"Obviously the quoted portions of the notice do not strictly satisfy the statutory requirement of a . . . copy of the





*contract . . . but it is equally evident that the principal terms of the agreement have been incorporated into the notice: The parties, the date, the purpose and the consideration. What is lacking is a recital of the fine print terms of a standard form contract. The question is: Does such an omission so avoid the statutory requirement as to negative legislative intent? We think not."*

(Emphasis supplied).

Applying the criteria indicated in *Peterman, supra*, it is apparent (1) that the parties are clearly set forth; (2) the dates involved are set forth not once but twice. The first time in the body of the affidavit itself and then again in the summary invoice that is attached to the notice of lien; (3) the type of work and where and when performed is also clearly shown as well as the consideration. In addition, the summary of the work done and amounts charged also indicates the number of each individual work invoice submitted to the bankrupt corporation on the date indicated.

If, as *Peterman, supra*, says:

"The purpose of the requirements of A.R.S. 33-993 is to give the property owner an opportunity to protect himself and time to investigate the claim and determine whether it is a proper charge,"

then it is submitted that the notice of lien herein more than meets such a standard; (4) and of course the notice



does contain the lienor's demand after deducting any just credits and offsets.

"The purpose of a materialmen's lien statute is to protect laborers and materialmen enhancing the value of another's property." *Ranch House Supply Corp. v. Van Slyke*, 91 Ariz. 177, 370 P.2d 661.

"It is the public policy of Arizona to protect the rights of those who furnish labor and material in the improvement of property." *Pioneer Plumbing Supply Co. v. Southwest Savings & Loan Ass'n*, 3 Ariz. App. 495, 415 P.2d 893, *vacated on other grounds*, 102 Ariz. 258, 428 P.2d 115.

Therefore, based on all of the foregoing, Appellant urges that the court below was in error when it found that the Appellant had not perfected its lien in accordance with Arizona law. On the facts and law, Appellant did have and still does have a valid lien. And it is further submitted that based on the facts and law cited in Part I of this argument that the aforementioned lien did and still does attach to the vendee's interest in the "Ann Clark" Property and/or the vendee's interest in the proceeds of the sale of such property, and it should be noted the Trustee is presently consummating a sale of the "Ann Clark" Property.



#### IV.

Appellant's next question for review is concerned with the validity of the Stipulation of February 21, 1967 (Appellant's Exhibit No. 5), by and between Appellant and the Trustee and his attorney.

By way of background, Appellant calls the Court's attention to the fact that the original lien and claim filed and recorded by Appellant on September 23, 1965, included Lot 1, Block 1, Catalina Place, the so-called "Ann Clark" Property. The claim filed with the court and the lien foreclosure suit by Appellant that was filed in the Superior Court of Maricopa County, Arizona, included Lot 1, Block 1, Catalina Place, and the Stipulation and Order (Appellant's Exhibit No. 5) of February 21, 1967, included Lot 1, Block 1, Catalina Place.

Lot 1, Block 1, Catalina Place, is, to the naked eye, the northeast corner of the parking lot and was always considered by all parties concerned, including the Trustee in Bankruptcy and the Appellant, as part and parcel of the so-called "North" Property.

It was, however, subsequently discovered that Lot 1, Block 1, Catalina Place, was still in the name of the Mayer Development Co., a partnership, even though the



funds used to initially acquire this property and all subsequent payments had been supplied by the debtor corporation. On March 21, 1966 (eleven months prior to the Stipulation in question), a hearing was held before The Honorable Vincent D. Maggione, Referee and Special Master (see Appellant's Exhibit No. 4). Referee Maggione found, *inter alia*, as a conclusion of law that "the debtor corporation had both the legal and equitable right and title to the buyer's interest in said agreement."

Based on this finding, Referee Maggione ordered the Mayer Development Company, a partnership, to execute a deed and assignment of their buyer's interest to the debtor corporation. This "turn over" order was not resisted by the Mayer Development Company and was very shortly thereafter complied with.

The effect of their order was really twofold. First of all it served to confirm the vendee's interest in the "Ann Clark" Property in the debtor corporation, an interest which was really always in the debtor corporation and further served to "relate back" the debtor corporation's title to the "Ann Clark" Property to the time of the original purchase agreement (see Appellant's Exhibit No. 3).





Second, it served to merge the "Ann Clark" Property back into the "North" Property where it had always, in effect, been.

With this background in mind, Appellant must take issue with the lower court's finding that the Trustee and his attorney were *both* inadvertent and neglectful when they signed the Stipulation of February 21, 1967.

The resemblance of a stipulation to a contract is a close and striking one and the language of the cases dealing with stipulation sounds in contract. "A stipulation concerning a pending cause in court *is to be construed like other contracts or written instruments between parties.*" (Emphasis supplied) *Evans v. Raper*, 185 Okla. 126, 93 P.2d 754.

"Generally, stipulations should receive a fair and liberal construction in harmony *with the apparent intention* of the parties and the spirit of justice." (Emphasis supplied) *Brandt's Estate*, 67 Ariz. 42, 190 P.2d 497. "In construing stipulations, in cases of doubt, that construction should be adopted which is favorable to the party in whose favor it is made." *Brandt, supra*.

"In construction of stipulations, the principal rule is to ascertain and give effect to the intentions of the



parties." *Gear v. City of Phoenix*, 93 Ariz. 260, 379 P.2d 972.

In *Evans, supra*, the Oklahoma Supreme Court also held that,

"It is a well settled proposition of law that litigants may stipulate concerning their respective rights involved in the case and are bound thereby where the agreements contained in the stipulation are not obtained through fraud or not contrary to law or public policy, and that the Courts will enforce the same."

In the matter at bar, the Stipulation of February 21, 1967, further supports the contract analogy in that the Stipulation not only recites the parties and their obligations but also recites the consideration (*i.e.*, partial release of lien for partial payment) as to the "South" Property.

If, then, we are dealing with a contract situation, it is necessary to further inquire into contract law in relation to the facts of this case.

#### V.

The Trustee is claiming, basically, that he made a mistake. There can be no question after reading Appellant's Exhibit No. 6 that the Appellant was, at all times,



fully aware of the significance of the legal description of the lien property and that it included the "Ann Clark" Property and further that this was the intention of the Appellant. Thus, we have a situation involving, at best, a unilateral mistake on the part of the Trustee and his attorney. And in a situation involving unilateral mistake, the general rule is that relief will be denied to the mistaken party unless the other party can be put back in status quo. CORBIN ON CONTRACTS, Vol. 3, Chapter 28, § 606.

Further, "It is essential in order to obtain a decree *rescinding or reforming a written conveyance, contract, assignment or discharge for mistake, that the facts necessary for the allowance of the remedy shall be proved by clear and convincing evidence and not by a mere preponderance.*" (Emphasis supplied) RESTATEMENT, CONTRACTS, § 511.

It is quite evident that the Trustee has failed to carry this burden, the sum and substance of their excuse being that, "There was a lot of work involved and we just slipped up here."

There is authority for the proposition that the mere claiming and alleging of inadvertence or carelessness is



not by itself sufficient to vacate a judgment or final order. See *Federal Enterprises v. Frank Allbritton Motors*, 16 F.R.D. 109 (D.C. Mo. 1954); *In re Wright*, 247 F. Supp. 648 (D.C. Mo. 1965); *Frank v. New Amsterdam Cas. Co.*, 27 F.R.D. 258 (D.C. Pa. 1961).

Of course, motions to vacate or other relief from an order are addressed to the sound discretion of the court. *Wojton v. Marks*, 344 F.2d 22 (C.A. Ill. 1965); *Swan v. United States*, 327 F.2d 43 (C.A. Ill. 1964), *cert. denied*, 85 Sup. Ct. 98, 379 U.S. 852.

"Generally whether there exists a sufficient showing of inadvertence or excusable neglect—is a matter of discretion with the trial court, *although the discretion is not an arbitrary one but a sound legal discretion guided by accepted principles.*" (Emphasis supplied).

*Smith v. Stone*, 308 F.2d 15 (C.A. Cal. 1962).

Appellant urges that based on the evidence (see Appellant's Exhibit 6), the trial court exceeded its discretion in granting the Trustee's motion to correct the Stipulation of February 21, 1967.

"Inadvertence" might have been reasonable if there had been no particular import to the "Ann Clark" Property prior to the date of the Stipulation. But the attorney for the Trustee in the arguments recorded on October 9,





1967, and October 18, 1967 (Appellant's Exhibit No. 6), made it very clear that there had been a great deal of work and time spent in relation to the "Ann Clark" Property. This particular piece of property had been a problem that the Trustee and the attorney for the Trustee had spent a good deal of time on and it was a piece of property whose legal description must have been burned into their minds. Yet, the Trustee presented no evidence at all in support of his position, although properly speaking as the moving party the burden was his, while the Appellant did present evidence in the form of testimony from Mr. Magruder, president of the Appellant corporation, and Mr. Magruder's evidence went uncontradicted.

Based on the foregoing facts of the case, based on the law and based on the exhibits, there is no doubt that the Trustee did not meet his burden of going forth with the evidence as to his inadvertence or mistake. He offered no testimony, he offered no affidavits and he offered no exhibits. He merely argued the matter. Yet his position was upheld by the trial court and the order and stipulation vacated. Appellant urges the Court that the Trustee presented no evidence which the trial court could have used as a basis for exercising its discretion



and, therefore, it was reversible error for the lower court to find for the Trustee in the matter of overthrowing the stipulation and setting aside the order in connection therewith.

Respectfully submitted,

/s/ Sidney B. Wolfe

---

Sidney B. Wolfe  
Attorney for Appellant

Irwin Harris  
Of Counsel

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Sidney B. Wolfe

---

Sidney B. Wolfe







IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

JOE FIGUEROA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

APPELLEE'S BRIEF

---

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

---

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

JOE FIGUEROA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

APPELLEE'S BRIEF

---

I

JURISDICTIONAL STATEMENT

Appellant, JOE FIGUEROA (hereinafter referred to as "FIGUEROA"), and codefendants Antonio Rosario (hereinafter referred to as "Rosario"), and Carmello Ocasio (hereinafter referred to as "Ocasio"), were indicted by the Federal Grand Jury for the Central District of California, on April 26, 1967 (C. T. 2]. <sup>1/</sup> The indictment alleged that on March 29, 1967, Ocasio committed an armed robbery of a United States Post Office in violation of Title 18, United States Code, Section 2114 [C. T. 2].

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<sup>1/</sup> "C. T. " refers to Clerk's Transcript.



FIGUEROA and Rosario were charged with aiding and abetting the robbery of this post office [C. T. 2].

On May 1, 1967, FIGUEROA was arraigned in the court of the Honorable E. Avery Crary, United States District Judge for the Central District of California. At this time FIGUEROA entered a plea of not guilty to the charges contained in the indictment [C. T. 11]. Judge Crary assigned the case to the Honorable Charles H. Carr, United States District Judge for all further proceedings [C. T. 11].

On June 13, 1967, Rosario withdrew his plea of not guilty and entered a plea of guilty to the lesser included offense of robbing a United States Post Office without the use of a dangerous weapon [C. T. 12]. On June 13, 1967, Ocasio also withdrew his plea of not guilty and entered a plea of guilty to the lesser included offense [C. T. 12]. The trial of defendant FIGUEROA commenced on June 13, 1967. On June 14, 1967, the jury returned a verdict finding FIGUEROA guilty of the lesser included offense, to wit, robbery of a United States Post Office without placing in jeopardy the life of any victim [C. T. 14-15].

On June 26, 1967, FIGUEROA was sentenced to the custody of the Attorney General for a period of ten years [C. T. 16]. On August 3, 1967, defendant FIGUEROA filed a notice of appeal [C. T. 19-22].

The jurisdiction of the District Court was based upon Section 2114 of Title 18, United States Code. This Court has jurisdiction to review the judgment of the District Court pursuant



to Title 28, United States Code, Sections 1291 and 1294.

## II

### STATEMENT OF FACTS

At the outset of the case, Judge Carr had a conference with counsel and obtained counsel's consent to discuss the sentencing provisions of Title 18, United States Code, Section 2114, concerning the 25-year sentence set forth in the statute and charged in the indictment [R. T. 22]. <sup>2/</sup> Judge Carr explained to the entire jury panel that FIGUEROA was on trial for a very serious offense, that if convicted on a charge of armed robbery of a post office he would be incarcerated for 25 years. Judge Carr further advised the jury that some of the evidence against FIGUEROA would be the testimony of Ocasio and Rosario who had entered pleas of guilty to a lesser included offense and that the maximum period of incarceration they faced was 10 years. Judge Carr clearly pointed out to the jury that a very weighty decision would be placed upon their shoulders and that if there existed any question of FIGUEROA's guilt in their minds they should acquit the defendant for the crimes of which he was charged [R. T. 23-24, 32-33].

At the trial, the evidence disclosed that on the morning of March 29, 1967, FIGUEROA met with Rosario in Wilmington, California [R. T. 84]. Shortly thereafter, FIGUEROA and Rosario

---

<sup>2/</sup> "R. T." refers to Reporter's Transcript.



picked up Ocasio and they all returned to Rosario's living quarters [R. T. 85-86]. While at Rosario's apartment, FIGUEROA told Rosario and Ocasio of the post office located on Carson Street in the Dominguez area which was operated by a single employee and which would be an easy place to rob [R. T. 86, 137]. After this brief discussion, Rosario provided a revolver and the three departed in FIGUEROA's automobile [R. T. 86, 162].

The testimony concerning the trip to and escape from the Post Office indicated that all three of the individuals had been drinking heavily and that they were sketchy on the precise facts of who was located in what position in the automobile [R. T. 85, 87, 99, 101-04, 137, 146, 91, 109, 151]. However, all of the witnesses agreed that early in the afternoon, Ocasio left FIGUEROA's automobile and went to the post office [R. T. 56, 61, 62, 69-70, 88-89, 137-38]. Upon arrival at the post office, Ocasio demanded all of the money from Mrs. Jeri Thomas, the clerk who was on duty at the substation. She gave Ocasio approximately \$150.00 from the postal money drawer and \$300.00 from another drawer utilized for the collection of utility bills [R. T. 57, 59]. Immediately, after procuring the money, Ocasio departed and walked a short distance from the post office where he was picked up by FIGUEROA and Rosario. Mr. Garbett, the proprietor of the postal substation, observed Ocasio entering FIGUEROA's automobile. Mr. Garbet followed the automobile for a distance of several blocks until it made an escape on the freeway. The evidence established that the automobile used to effectuate the





the escape following the robbery was registered in the name of FIGUEROA [R. T. 71-75]. FIGUEROA and his two partners in crime then proceeded to Rosario's living quarters where they divided the money taken in the robbery [R. T. 92, 139-40].

Testifying at trial, FIGUEROA denied any involvement in the robbery. However, FIGUEROA admitted that the automobile used in the robbery was his, claiming that Ocasio and Rosario had taken the car while FIGUEROA was sleeping [R. T. 178, 169]. Moreover, FIGUEROA admitted that following the robbery he had known that the police were looking for him and that he was evading arrest during the period from March 29th to April 3, 1967, the date on which he surrendered to the law enforcement authorities [R. T. 183-84]. The Government presented one rebuttal witness who testified that -- in the presence of FIGUEROA -- Ocasio claimed that they had robbed the post office on East Carson Street and at this time FIGUEROA did not deny his involvement [R. T. 194].

At the close of the trial, Judge Carr carefully instructed the jury on the credibility of accomplices and admonished them not to consider the matter of punishment in their deliberations [R. T. 271, 276]. Judge Carr -- as well as counsel in their arguments -- emphasized that in order to return a verdict of guilty, the testimony of the accomplices must be believed beyond a reasonable doubt [R. T. 211, 248, 226-27]. On June 14, 1967, the jury returned a verdict finding FIGUEROA guilty of the lesser included offense, abetting the robbery of a United States Post



Office without the use of a dangerous weapon [C. T. 14; R. T. 291].

On June 26, 1967, Judge Carr sentenced FIGUEROA, Ocasio and Rosario each to imprisonment for a period of 10 years. Only FIGUEROA filed an appeal from this judgment.

### III

#### ARGUMENT

A.      THERE EXISTS SUBSTANTIAL EVIDENCE  
         SUPPORTING THE CONVICTION OF  
         DEFENDANT FIGUEROA.

---

1.      THE RULE PERMITTING A CONVIC-  
         TION TO BE BASED UPON THE  
         UNCORROBORATED TESTIMONY OF  
         AN ACCOMPLICE IS WELL ESTAB-  
         LISHED AND SHOULD NOT BE  
         CHANGED.

---

FIGUEROA contends that the Ninth Circuit should abandon the long standing rule that a person may be convicted on the uncorroborated testimony of an accomplice [Brief for Appellant at 11-12]. In responding to a similar contention, the Ninth Circuit in Audett v. United States, 265 F.2d 837, 846-47 (9 Cir. 1959), states:

"The short answer is that the federal doctrine which permits such conviction is sound and consonant with the rule obtaining in the law of evidence that the testimony of one witness, if believed, is sufficient to prove a fact, is approved by the Supreme Court



and is firmly established in the law of this and other circuits. "

The ruling set forth in Audett, supra, was reaffirmed in White v. United States, 315 F.2d 113, 115 (9 Cir. 1963), and Williams v. United States, 308 F.2d 664, 666 (9 Cir. 1962). The reason for this rule appears to be that it is for the trier of fact to ascertain the weight and credibility to be given to the testimony of an accomplice, and if it is believed beyond a reasonable doubt then it is sufficient to convict.

In the present case the testimony of Rosario clearly implicated FIGUEROA's involvement in the robbery of March 29, 1967. Rosario testified that FIGUEROA was the instigator of the criminal plan [R. T. 86]; that he drove the getaway car [R. T. 86-]; and that he received a portion of the funds obtained in the robbery [R. T. 92-93]. Ocasio testified to essentially the same facts, except for some minor variations [R. T. 137, 140, 152].

Although a cautionary instruction concerning the testimony of an accomplice is not an "absolute necessity" (see Audett v. United States, supra, at 847), the trial court warned the jury that the testimony of an accomplice "should always be received with great caution and weighed with great care" [R. T. 271]. Considering the long standing rule permitting a conviction to be based upon the uncorroborated testimony of an accomplice and the fact that the cautionary instruction was given, it is respectfully submitted that FIGUEROA's conviction be affirmed.



2. THE TESTIMONY OF THE ACCOM-  
PLICES, OCASIO AND ROSARIO  
WAS CORROBORATED.

---

Appellant seeks to have this Court adopt a rule requiring corroboration of the testimony of an accomplice in order to sustain a conviction. It is recognized that in a number of jurisdictions this requirement does exist. See People v. McEwing, 46 Cal. 2d 218, 288 P. 2d 257 (1955) where the California Supreme Court stated:

"The corroborating evidence is sufficient if it tends to connect the defendant with the commission of the crime in such a way as may reasonably satisfy the jury that the witness who must be corroborated is telling the truth." (Id. at 224, 288 P. 2d at 260).

In the present case Mr. Garbett testified that he observed the robber Ocasio make his escape in a red Pontiac, license number LBS 475, and this automobile was proven to be registered in the name of FIGUEROA [R. T. 72-75]. Another point of corroboration is found in the testimony of Mr. Garcia who testified that on March 29th, in the presence of Ocasio and FIGUEROA, Ocasio admitted that they had robbed a post office. FIGUEROA did not deny his involvement at that time and it is, therefore, submitted that his silence was indicative of his involvement [R. T. 192-95].

In several areas FIGUEROA's own testimony corroborated





the testimony of Rosario and Ocasio. FIGUEROA admitted exchanging a number of small bills into a \$100 bill at a liquor store [R. T. 176-77]. Mrs. Thomas, the victim of the robbery, testified that most of the money stolen consisted of small denomination currency [R. T. 58-59]. Furthermore, FIGUEROA admitted going into hiding for several days when he knew the police were looking for him [R. T. 183-84]. It is respectfully submitted that the above-mentioned corroborating evidence would constitute sufficient corroboration to satisfy those jurisdictions which require that the testimony of an accomplice be corroborated. See People v. Goldstein, 146 Cal. App. 2d 268, 303 P. 2d 892 (1956).

3. CONTRARY TO APPELLANT'S  
CONTENTION, THE TESTIMONY OF  
OCASIO WAS NOT INHERENTLY  
IMPROBABLE BUT RATHER COR-  
ROBORATED THE PRINCIPAL  
FACTS OF ROSARIO'S TESTIMONY  
IMPLICATING FIGUEROA IN THE  
ROBBERY.

---

It is well established that the jury is the sole judge of the credibility of the witness and the weight to be given to their testimony. See United States v. Schneiderman, 106 F. Supp. 906, 928-29 (S. D. Cal. 1952). However, because certain inconsistencies appear between the testimony of Rosario and Ocasio, appellant contends that the testimony of Ocasio should not have been considered by the jury [Brief for Appellant, at 10]. It is difficult to respond to a contention of this type, because there is no



allegation that any of the testimony given by Ocasio was incompetent for any reason. Moreover, any inconsistency in the testimony of Ocasio and Rosario would appear to inure to the benefit of FIGUEROA by discrediting Rosario's testimony.

A brief review of the testimony of Ocasio shows that it varies from the testimony of Rosario only as to insignificant details. The fact that their testimony revealed that all the individuals had been drinking heavily prior to the commission of the robbery could well explain any difficulty encountered in attempting to recall precisely the details concerning the robbery [R. T. 85, 87, 99, 101-04, 137, 146]. Ocasio and Rosario differed as to who was lying in the backseat of FIGUEROA's automobile during the escape [R. T. 91, 152]. It is this type of discrepancy that FIGUEROA contends establishes the fact that Ocasio's testimony cannot be believed. In addition, the record reveals that Ocasio required the assistance of an interpreter, and this undoubtedly created some problem in communication as to the manner in which questions are phrased and answered [R. T. 133-34]. However, Ocasio's testimony basically corroborated Rosario's statement of the facts occurring on March 29, 1967. Ocasio recalled meeting FIGUEROA, discussing the robbery, being driven to the post office by FIGUEROA, robbing the post office, Ocasio's returning to FIGUEROA's automobile, and FIGUEROA's receiving some of the proceeds [R. T. 137-40].

It is respectfully submitted that FIGUEROA's contention concerning the testimony of Ocasio is totally without merit. It is



within the province of the jury to evaluate the credibility of witnesses and make the finding of fact. United States v. Schneiderman, supra, at 928-29. In the instant case the jury had a full opportunity to evaluate the facts concerning the credibility of Rosario and Ocasio, who they believed beyond a reasonable doubt in order to convict FIGUEROA for his involvement in the robbery.

4.       CONSIDERING THE EVIDENCE IN  
          THE LIGHT MOST FAVORABLE TO  
          THE GOVERNMENT, THE RECORD  
          CLEARLY REFLECTS SUBSTANTIAL  
          EVIDENCE TO SUPPORT THE CON-  
          VICTION OF FIGUEROA.

---

Appellant contends that there does not exist sufficient evidence to justify the conviction of FIGUEROA. In reviewing a contention of this type the role of the Appellate Court has been described by the United States Supreme Court by stating . . . "It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." Glasser v. United States, 315 U.S. 60, 80 (1942); accord, Audett v. United States, supra, at 844-45; and Peek v. United States, 321 F.2d 834, 945 (9 Cir. 1963), cert. denied 376 U.S. 954 (1964). In the present case there was uncontradicted testimony from both Rosario and Ocasio, both accomplices in the commission of this robbery, that FIGUEROA planned and executed the robbery with them [R. T. 86-87, 92-93,



137-40]. In addition, there was testimony that FIGUEROA drove his car during the robbery. Mr. Garbett, observed the red Pontiac -- belonging to FIGUEROA -- pick up Ocasio and escape from the scene of the robbery [R. T. 71-75]. Furthermore, FIGUEROA admitted going into hiding for approximately three days to avoid arrest, this flight being indicative of guilt [R. T. 183-84]. If the evidence is construed in the light most favorable to the Government, the record clearly supports the jury's determination that FIGUEROA committed the crimes with which he was charged. Therefore, it is respectfully submitted that there exists substantial and overwhelming evidence indicating FIGUEROA's guilt.

B. THE IMPOSITION OF THE MAXIMUM  
TERM PROVIDED BY LAW IS A  
MATTER OF JUDICIAL DISCRETION  
AND, WITHOUT A SHOWING OF ANY  
ABUSE OF THIS DISCRETION, SHOULD  
NOT BE DISTURBED ON APPEAL.

---

1. CONTRARY TO APPELLANT'S  
CONTENTION, THERE IS NO INDICA-  
TION FROM THE TRIAL RECORD  
THAT THE DISTRICT COURT DID  
NOT CONSIDER THE PROBATION  
REPORT IN SENTENCING FIGUEROA.

---

When the jury returned a verdict on June 14, 1967, Judge Carr stated that there was little chance that defendant FIGUEROA would be placed on probation [R. T. 294-295]. However, the defendant FIGUEROA was not sentenced at that time. Judge Carr referred the case to the Probation Department for the purposes of





receiving a pre-sentencing report [R. T. 298]. At the time of sentencing, the pre-sentencing report was discussed at length between Judge Carr and counsel for FIGUEROA [R. T. 315-17]. Judge Carr made it clear that he was determined to impose a jail sentence on the defendant FIGUEROA, as he did the codefendants Ocasio and Rosario [R. T. 322]. Judge Carr stated that his decision was controlled by the serious nature of the crime as well as the defendant's previous felony convictions in 1943 and 1952 [R. T. 318, 320-21]. Based upon the above-mentioned facts, it is respectfully submitted that the defendant's contention that the sentencing was made without the benefit of any pre-sentence report is frivolous, erroneous and without merit.

There exists a line of authority establishing that it is a matter of discretion for the trial court to have a pre-sentence report prepared. In United States v. Karavias, 170 F.2d 968, 971 (7 Cir. 1948), the court rejected defendant's contention that Rule 32(c), Federal Rules of Criminal Procedure, imposed an obligation on the District Court judge to have a pre-sentence report prepared prior to sentencing. The court said:

"[R]ule [32(c)] plainly indicates that the mandate is upon the probation officer and not upon the court.

The court is not obliged to order a presentence report or to utilize the services of the probation department prior to passing sentence."



This same rule was applied by the Ninth Circuit in the case of Sherman v. United States, 261 F. Supp. 522, 532 (D. C. Hawaii (1966), aff'd 383 F.2d 837 (9 Cir. 1967), where the court stated:

"Although the normal procedure before sentencing is that the pre-sentence investigation is made and presented to the court, there is nothing in any of the statutes or rules which demands that such a pre-sentence investigation or report be made, filed with the court or considered by the court before sentencing."

Based upon the guiding principle that a trial court is not required to consider a pre-sentence report, or even to have one prepared, the defendant FIGUEROA's contention that the conviction should be reversed because the sentence was entered without the benefit of a pre-sentence report does not constitute reversible error. In fact, the manner in which the sentencing was conducted by Judge Carr was an exemplary procedure, giving full consideration to all pertinent facts and giving FIGUEROA full opportunity to present all facts on his own behalf.



2. THE IMPOSITION OF THE MAXIMUM TERM PROVIDED BY STATUTE UPON APPELLANT DID NOT VIOLATE THE EIGHTH AMENDMENT BAN AGAINST "EXCESSIVE, CRUEL AND UNUSUAL PUNISHMENT".

---

"If there is one rule in the federal criminal practice which is firmly established, it is that the appellate court has no control over a sentence which is within the limits by a statute." See Gurara v. United States, 40 F.2d 338, 340-41 (8 Cir. 1930).

The Ninth Circuit has repeatedly refused to question or to interfere with the trial judge's discretion in imposing a sentence when it is within the statutory limit. See Bryson v. United States, 265 F.2d 914 (9 Cir. 1959); Brown v. United States, 222 F.2d 293, 298 (9 Cir. 1955); Russell v. United States, 288 F.2d 520, 524 (9 Cir. 1961).

The sentence imposed upon defendant FIGUEROA was ten years in the custody of the Attorney General. The jury's verdict finding a violation of Title 18, United States Code, Section 2114, without placing the life of any person in jeopardy or the use of a dangerous weapon, carries with it a maximum term of ten years incarceration. Considering that the defendant FIGUEROA had two prior felony convictions the sentence was not at all unreasonable. It may be noted that both the defendants Rosario and Ocasio, neither having as serious a criminal record as FIGUEROA,



received identical sentences [R. T. 323; C. T. 16]. It is respectfully submitted that appellant's contention is totally without merit.

C. THE DISTRICT COURT DID NOT ERR, NOR WAS THE DEFENDANT PREJUDICED BY THE COURT'S STATEMENT TO THE JURY THAT THE OFFENSE CHARGED IN THE INDICTMENT CARRIED WITH IT A PENALTY OF TWENTY-FIVE YEARS INCARCERATION, ESPECIALLY WHEN ALL COUNSEL CONSENTED TO THE MATTER BEING BROUGHT TO THE ATTENTION OF THE PROSPECTIVE JURORS.

---

Prior to impaneling the jury, Judge Carr inquired of both counsel as to whether they had any objection to his discussing with the jury the fact that a conviction of the charge contained in the indictment could result in a maximum incarceration of twenty-five years [R. T. 22-23]. Upon this request, counsel for defendant specifically stated that he had no objection to Judge Carr's discussing this matter with the jury [R. T. 22]. Despite this explicit waiver by counsel for FIGUEROA, appellant now contends that Judge Carr's comments to the jury constitutes prejudicial error [Brief for Appellant at page 8]. A review of Judge Carr's comments to the jury shows that the purpose and intent of the comment was to emphasize the gravity of the decision that the jurors would be called upon to make. Furthermore, Judge Carr informed the jury that the witnesses for the Government had entered pleas of guilty to the lesser included offense and, therefore, the maximum that they could be sentenced was ten years, whereas FIGUEROA





could be imprisoned for twenty-five years, if convicted [R. T. 23].

It is difficult to imagine how the discussion of the fact that FIGUEROA was facing a more severe punishment could have prejudiced his rights to a fair trial. The logical conclusion is that the jury was apprised of a possible inequity in finding FIGUEROA guilty, because of his aiding and abetting status when Ocasio, the man who actually went into the post office with a weapon, could only be imprisoned for ten years. If anyone was prejudiced by this, it would have been the Government. However, because of the nature of the case, and the desire for a careful consideration of the evidence, all parties concurred with the judge's desire to point out the gravity of the matter upon which the jurors must pass judgment [R. T. 22].

At the conclusion of the case, Judge Carr carefully instructed the jury that their sole duty was to determine the defendant's guilt or innocence of the crime with which he was charged. The court emphasized that the matter of punishment was for the court alone to decide and should not be considered by the jury in passing upon the guilt or innocence of FIGUEROA [R. T. 276]. Thus the jury retired to the deliberating room with Judge Carr's admonition and found FIGUEROA guilty of the lesser included offense -- the same offense to which Rosario and Ocasio had pled guilty. Appellant has failed to indicate in what manner FIGUEROA was prejudiced by Judge Carr's comments concerning the sentence involved under the statute. As the reviewing courts have frequently stated: "We do not presume error; we require the appellant to



demonstrate it." Sica v. United States, 325 F.2d 831, 836 (9 Cir. 1963); cert. denied 376 U.S. 952 (1964). In the present case appellant has failed to establish in any manner how or why he was prejudiced by Judge Carr's statements to the jury concerning the ostensibly inequitable position of FIGUEROA when compared to Ocasio and Rosario.

#### IV

#### CONCLUSION

For the reasons set forth in this brief, appellee respectfully submits that the conviction be affirmed.

Respectfully submitted,

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N O. 2 2 6 5 3  
IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

KENNETH LEROY HOWARD,  
Appellant,  
vs.  
UNITED STATES OF AMERICA,  
Appellee.

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APPELLEE'S BRIEF

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APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
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N O. 2 2 6 5 3  
IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

KENNETH LEROY HOWARD,  
Appellant,  
vs.  
UNITED STATES OF AMERICA,  
Appellee.

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APPELLEE'S BRIEF

STATEMENT OF JURISDICTION  
AND PROCEEDINGS

This is an appeal by defendant Howard, pursuant to 18 U. S. C. §§ 1291, 1294, from a conviction for violations of 21 U. S. C. §174 and §176a.<sup>1/</sup>

On July 5, 1967, the United States Grand Jury for the Central District of California, returned an indictment charging the defendant:

In Count One, with intent to defraud, knowingly receiving, concealing and facilitating the transportation and concealment of approximately 11,000 grams of illegally imported marihuana, in violation of 21 U. S. C. §176a; and, in Count Two, with knowingly and unlawfully receiving, concealing and facilitating the concealment

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<sup>1/</sup> Whether designated as 21 U. S. C. §176a or as 21 U. S. C. §176(a), the same statute is meant to be referred to: 21 U. S. C. §176a.



and transportation of 51 grams of illegally imported heroin hydrochloride, in violation of 21 U.S.C. §174 (C. T. pp. 2, 3).<sup>2/</sup>

On September 12, 1967, before the Honorable Charles H. Carr, United States District Judge, a hearing was held on the defendant's motions to dismiss the indictment and to suppress certain evidence (C. T. 38). After receiving evidence, and hearing argument, the court denied the motions (C. T. 38).

The United States and the defendant waived their right to trial by jury and to special findings of fact, and on September 12, 1967, the case proceeded to a court trial (C. T. 38, 39). The parties stipulated that the testimony taken by the court during the motion to suppress could be considered by the court as if offered by the Government during its case-in-chief (R. T. 104-107).<sup>3/</sup>

On September 13, 1967, the court found the defendant guilty on both counts (C. T. 40). On October 9, 1967, the court sentenced the defendant to five years on each count, the sentences to begin and run concurrently (C. T. 49, 50, 55). Motions by the defendant for judgment of acquittal or for a new trial, were denied (C. T. 50).

On October 9, 1967 the defendant filed a notice of appeal (C. T. 51).

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1/ "C. T. " refers to Clerk's Transcript.

2/ "R. T. refers to Reporter's Transcript.



## STATEMENT OF ISSUES

1(a). Do 21 U.S.C. §174 and 21 U.S.C. §176(a) by distinguishing between a court trial and a jury trial, condition defendant's right to a jury trial in violation of U.S. Constitution Amendments V and VI?

1(b). Does the quantum of evidence necessary to sustain a conviction under 21 U.S.C. §§ 174 and 176(a) depend upon whether that conviction is by a court or jury?

2. Do 21 U.S.C. §174 and 21 U.S.C. §176(a) require the defendant to testify against himself or otherwise invade the defendant's right against self-incrimination in violation of the U.S. Constitution Amendment V?

3. Does the statutory evidence rule, in 21 U.S.C. §174 and in 21 U.S.C. §176(a), irrationally associate possession of narcotics and marihuana, respectively, with the fact of the importation contrary to law, or with knowledge by the defendant of such illegal importation?

4. Did the seizure and search of the defendant's Buick violate U.S. Constitution Amendment IV?

5. Is the evidence sufficient to sustain the conviction for violating 21 U.S.C. §176(a)?

6. Is the evidence sufficient to sustain the conviction for violating 21 U.S.C. §174?

7. Should this Court in affirming the conviction reach all of the constitutional questions raised?



## STATEMENT OF FACTS

The uncontradicted evidence at trial was produced from seven government witnesses (R. T. 11, 44, 56, 66, 108, 115, 137). Defendant Kenneth LeRoy Howard (hereinafter referred to as "Howard") did not testify and defendant produced no other witnesses (R. T. 143).

About May 16 or 17, 1967, one Tuaco hired Jesus Rios to drive a load of marihuana from Tijuana, Mexico to Los Angeles, California using Rios' Chevrolet automobile (R. T. 53-55). Tuaco worked for Patricio Basera, a known major narcotics transporter and dealer (R. T. 54). Soon after, Rios reported his conversations about the marihuana to U. S. Customs officials (R. T. 56, 57). Rios became a special customs employee and was later paid \$500 for his services (R. T. 15, 17, 66).

On May 21, 1967, Rios left his car with Patricio in Tijuana (R. T. 63, 64). He called U. S. Customs and told them his car was in Tijuana being loaded with marihuana (R. T. 56-58). Rios described this car to Customs Agent White, who told Rios to re-enter the United States with the car through border lane one (R. T. 58, 59). White arranged an entry without inspection, assuming that, if Rios came through with the car, then the car contained marihuana (R. T. 59, 60). Several hours later, Rios returned to Tijuana and picked up his car. Patricio said the marihuana was in the car, although Rios didn't see it. Patricio told Rios to drive the car to a motel in Hollywood and to report his arrival to Tijuana,





after which he would receive further instructions (R. T. 17, 18, 63-66, 20).

Later, that day, Rios drove his car through lane one into the United States, under the surveillance of Customs Agent White and Greppin (R. T. 17-19, 45, 60). To protect the security of the investigation, the car was not seized at the border and Rios was told to proceed to Chula Vista, California (R. T. 45, 60). Rios was escorted from the border by White and Greppin (R. T. 16, 36, 37). At a bowling alley, in Chula Vista, California, fifteen miles north of the border, White and Greppin inspected the Chevrolet and saw marihuana bricks in the panels (R. T. 47, 49, 50). At this time they seized the marihuana although they left it in the Chevrolet (R. T. 61, 62, 50).

Rios, driving the Chevrolet, and Greppin and White, arrived at the Los Angeles federal building about 10:30 p. m. on May 21, 1967 where they met Customs Agent McCombs (R. T. 15, 16). The Chevrolet was examined and one hundred sixty pounds of marihuana was discovered hidden beneath the seats and in the panels. Seventy eight bricks were removed, and some marihuana was left in the car (R. T. 14, 15, 21, 22).

Rios, in accordance with instructions he had received, was taken with the car to a motel in Hollywood where he and the car remained throughout part of May 22, 1967 (R. T. 13-19). Rios made a few calls to Tijuana in which he spoke with three persons and received instructions to park the Chevrolet at a location on 32nd Street in Los Angeles (R. T. 20, 32-35).



On May 22, 1967, before 10:00 p. m. , Rios drove the car to the location on 32nd Street between Hill and Broadway in Los Angeles, followed by U. S. Customs Agents (R T. 29, 116). The car was parked and a surveillance was established (R. T. 29, 121).

On May 22, 1967, after the load car was parked, Howard, driving a 1963 bronze Buick in an easterly direction on 32nd Street, passed the load vehicle and arrived at the intersection of 32nd Street and Broadway. Agent Diaz, walking in a westerly direction on the south side of 32nd Street, arrived at the intersection at the same moment. Diaz entered the crosswalk, as Howard turned right onto Broadway blocking the crosswalk. Howard stopped his forward motion and backed up in the direction Diaz was walking. While he backed up Howard watched Diaz in a way which drew Diaz' attention to him. Diaz continued walking west along 32nd Street and Howard disappeared from view. Two or three minutes later Diaz again saw Howard. At this time Diaz had reached the load car, the Chevrolet, which was parked about 150 feet east of Hill Street on the south side of 32nd Street. Howard was now driving in the same direction Diaz was walking, west along 32nd Street. Howard passed the load car, crossed Hill Street and parked the Buick on the north side of 32nd Street, about 100 feet from the intersection of 32nd Street and Hill. Diaz saw Howard leave the Buick and walk back toward Diaz and the load car. At one point they were within fifty feet of each other. Diaz reached the corner, turned south onto Hill Street, lost sight of Howard, and ran around the block toward the intersection of 33rd Street and Broadway. He



saw the load car, driven by a male, turn right from 32nd Street onto Broadway, and travel south along Broadway. Diaz entered his own car, and, over his radio, reported that the load car had been driven away (R. T. 115-126).

Howard was under nearly continuous surveillance by Customs Agents in five or six cars. Howard first drove to a Chevron Service Station on 40th and South Broadway where he stopped and spoke to an attendant. He then walked toward two telephone booths. Three to five minutes later, Howard was again driving the Chevrolet south along Broadway. Howard turned right onto 46th Street and halfway up the block, pulled to the curb, turned his lights off, and parked (R. T. 13, 29, 107-109, 112-114). It was about 10:15 p. m. (R. T. 14).

Customs Agents went to Howard, identified themselves, and placed him under arrest for violating federal marihuana laws. Howard was removed from the Chevrolet and advised of his constitutional rights (R. T. 26-28, 32, 107-109, 128-129). Howard said he had taken the Chevrolet because he intended to steal the mag wheel rims and had parked on 46th Street because he intended to remove the rims. He intended to sell them for \$8 each. (Mag rims are expensive special wheels used by custom car and sports car fans). (R. T. 27, 109, 128-129).

Howard was searched after he was arrested. Eight hundred seventy nine dollars in cash and some car keys were discovered (R. T. 110-112). Howard said that he was an unemployed barber and that the money was his life savings (R. T. 128-129).



The Chevrolet was examined on 46th Street, and the agents verified the presence of marihuana bricks in the right door panel. The marihuana was later removed from the Chevrolet (R. T. 103, 104, 128-129, 134-136).

The Buick was then immediately seized by several Customs Agents, acting under orders from Agent McCombs. The basis for the seizure was the use of the Buick to facilitate the concealment, receipt and transportation of illegally imported marihuana (R. T. 24, 25, 31, 33-34, 127, 136-139). The keys found on Howard were used to unlock the Buick and to operate the Buick, which was driven to the Los Angeles federal building parking lot (R. T. 24-26, 127, 136-139). The Buick was searched at the parking lot. Fifty-one grams of heroin, packaged in a rubber prophylactic, and 18.7 grams of cocaine, were discovered in the console glove box between the front seats (R. T. 33, 34, 41, 103, 104, 137, 138).

### ARGUMENT

#### I

THE COURT SHOULD AFFIRM THE JUDGMENT  
BELOW, UPON THE OBVIOUS CORRECTNESS  
OF THE CONVICTION UNDER 21 U.S.C. §176(a),  
AND AVOID THE UNNECESSARY DECISION OF  
NUMEROUS CONSTITUTIONAL ISSUES.

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Most of Howard, s claims of error relate to the existence and use of the statutory rule based upon possession, and the seizure and search of the Buick, which disclosed the heroin. The





decision of these constitutional issues is unnecessary since Howard received concurrent five year sentences. Page v. United States, 356 F. 2d 337 (9th Cir. 1966); United States v. Gainey, 380 U.S. 63, 65 (1965).

The evidence in the case is clearly sufficient, apart from any statutory rule of evidence, to sustain the conviction under 21 U.S.C. §176(a). The sufficiency of the evidence is discussed below in the last section of this brief. If this Court follows this approach, then the only other issue which would have to be dealt with is Howard's claim that the decisions in Marchetti v. United States, 390 U.S. 39 (1968); Grosso v. United States, 390 U.S. 62 (1968) and Haynes v. United States, 390 U.S. 85 (1968), require a reversal here.

## II

### NEITHER 21 U.S.C. §174 NOR 21 U.S.C. §176(a) DISTINGUISHES BETWEEN A COURT AND JURY TRIALS.

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Howard's arguments that 21 U.S.C. §174 and 21 U.S.C. §176(a) distinguish between court trial and jury trials in two ways ignores the settled interpretation of both statutes. The statutory rule of evidence based upon unexplained possession operates in both court and jury trials. Howard is wrong when he argues that the rule applies only in jury trials, and that the difference means that different quantities of evidence are needed to sustain a conviction depending on the mode of trial.



No case is cited in support of the novel interpretation of 21 U.S.C. §174 and §176(a) which Howard now urges upon this Court. (Appellant's opening brief, p. 6, line 13-p. 7, line 4).

In United States v. Gainey, 380 U.S. 63 (1965), speaking of an analogous rule, the court said that a jury is not required to use the rule. It said:

"The jury was thus specifically told that the statutory inference was not conclusive. 'Presence' was one circumstance to be considered among many. Even if it found that the defendant had been present at the still, and that his presence remained unexplained, the jury could nonetheless acquit him if it found that the Government had not proved his guilt beyond a reasonable doubt." (at p. 70).

In Pool v. United States, 344 F.2d 943 (9th Cir. 1965), the court, sitting without a jury, convicted the defendant of a violation of 21 U.S.C. §174, using the statutory rule of evidence. The leading Ninth Circuit case on the meaning of "possession" arose on an appeal from a court trial convicting the defendant under 21 U.S.C. §174. Hernandez v. United States, 300 F.2d 114 (9th Cir. 1962). If Howard is right, then the entire Hernandez opinion is dicta. In Williams v. United States, 290 F.2d 451 (9th Cir. 1961), the court reversed a non-jury lower court conviction because the evidence was insufficient to sustain a finding that the defendant had possession of the marihuana. In Notaro v. United States, 388 F.2d



680 (9th Cir. 1967), 363 F.2d 169 (9th Cir. 1966), this Court sustained the conviction of the defendant for violating 21 U. S. C. §176(a), which was made by the lower court sitting without a jury, upon evidence showing no more than possession of the marihuana by the defendant.

In Verdugo v. United States, No. 20803, (9th Cir. 1968), this Court said:

"The second paragraph of §174 permits the trier of fact to infer guilt from unexplained possession of the narcotic drug by the defendant . . .

"It remains the right of the trial judge to direct the verdict or enter a judgment n. o. v. when the evidence as a whole is insufficient to support a conviction as a matter of law, notwithstanding proof of possession. And although the evidence as a whole meets this minimum standard, it remains the function of the jury to determine whether that evidence, including the evidence of possession, establishes each element of the offense beyond a reasonable doubt.

United States v. Gainey, 380 U. S. 63, 68, 70 (1965)."  
(Slip opinion at p. 4) (Emphasis added).

Howard's reliance upon United States v. Jackson 390 U. S. 570 (1968), is misplaced. That case did not deal with these statutes and is distinguishable. The Jackson case holds that the Federal Kidnapping Act, 18 U. S. C. §1201(a), did differentiate



§176(a) is not error. As to the marihuana, there is no evidence that the trial court relied upon the statutory inference, and there was clearly independent evidence regarding the unlawful importation and Howard's knowledge. In reviewing a judgment, the appellate court adopts all inferences favorable to the judgment below. (See Section VII of this brief, below). Second, the record shows no one compelled him to testify, and any argument against the statutes on that ground is gratuitous. Third, the record shows he was not prevented from testifying, but that he exercised his Fifth Amendment right to not take the stand.

The old argument that the statutory rule of evidence provisions in 21 U. S. C. §174 and §176(a) require the defendant to testify personally has been repeatedly rejected for forty-three years. In Yee Hem v. United States, 268 U. S. 178, 185 (1925), the court said: "The point that the practical effect of the statute creating the presumption is to compel the accused person to be a witness against himself may be put aside with slight discussion. The statute compels nothing. It does no more than to make possession of the prohibited article prima facie evidence of guilt. It leaves the accused entirely free to testify or not as he chooses. If the accused happens to be the only repository of the facts necessary to negative the presumption arising from his possession, that is a misfortune which the statute under review does not create but which is inherent in the case. The same situation might present itself if there were no statutory presumption and a prima facie case of concealment with knowledge of unlawful importation were made by





Considering both the long history rejecting Howard's claim of a Fifth Amendment violation, and the absence of any reason, policy or authority for changing the statutory meaning to create that constitutional problem, Howard's position should be rejected.



#### IV

### THE STATUTORY RULE OF EVIDENCE PERMITTING CONVICTION UPON EVIDENCE OF UNEXPLAINED POSSESSION OF HEROIN OR MARIJUANA IS NOT UNCONSTITUTIONAL.

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Howard's attempt to reverse his conviction because the trial court might have applied the statutory rule of evidence is without merit. (See appellant's brief, p. 6, lines 1-5, p. 11, lines 9-15.) It is clear that the provision in 21 U. S. C. §174 and §176a which permits conviction upon a showing of unexplained possession of the narcotic drug or marihuana, respectively, functions as a " . . . statutory rule of evidence . . . " Erwing v. United States of America, 323 F.2d 674, 679 (9th Cir. 1963). Cf. United States v. Gainey, supra. As this court said:

"Thus the function of 'possession' in the statutory scheme is to shift to the defendant the burden of identifying the legitimate source of the narcotic drugs, if, indeed they were not illegally imported. This statutory rule of evidence rests upon (1) the rational relationship between 'possession' of narcotic drugs by the defendant and knowledge on his part that a substance which is normally imported and rarely imported legally, was in fact imported contrary to law, plus (2) as a corollary, the consideration that the 'possessor' of the narcotic drugs has so much more convenient access to



the facts as to their source that it is not unreasonable to require him to come forward with an explanation. Hernandez v. United States of America, 300 F.2d 114, 118, 119 (9th Cir. 1962).

The Supreme Court and this court have repeatedly upheld the rationality of this rule when dealing with heroin. Yee Hem v. United States of America, 268 U.S. 178 (1925). In Juvera v. United States of America, 378 F.2d 433, 437 (9th Cir. 1967) this court described the charge of unconstitutionality as " . . . an utterly groundless assertion." When the challenge arose in a prosecution under 21 U.S.C. §176a, this court rejected it. Zaragoza v. United States of America, 389 F.2d 468 (9th Cir. 1968).

In United States v. Gainey, 380 U.S. 63 (1965) an analogous statutory inference was sustained by the Supreme Court. It said:

" . . . the constitutionality of the legislation depends upon the rationality of the connection 'between the facts proved and the ultimate fact presumed' (citation). The process of making the determination of rationality is, by its nature, highly empirical, and in matters not within specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it." (at pp. 66, 67).

This court recognized the rationality, when heroin is the



defendant knew it. The point is discussed in the last section of this brief.

Erwing v. United States, 323 F.2d 674 (9th Cir. 1963) relied upon by Howard, is distinguishable. The defendant there introduced evidence to show that the operation of the statutory rule in that case would not be rational because there was no way to tell whether the cocaine involved was imported. Cocaine was legally manufactured and distributed in the United States, and there was no evidence to show the defendant in possession of any substance which was not legal in the United States. In this case, Howard introduced no evidence of any kind with respect to the rationality of the statutory rule.

Further, in our case, there was evidence that the statutory rule was operating rationally. The marihuana was known to be from Mexico, and, as to heroin, the rule always seems to be rational, considering the present laws. See 21 U.S.C. §§173, 188b, 188c, 188d.

The adoption of Howard's position regarding the statutory rule would vastly increase the already great difficulty of controlling the illegal, clandestine traffic in marihuana and heroin. The only beneficiaries would be the importers, distributors and wholesalers engaged in this illicit industry. The constitution does not require, and sound policy forbids this result, unless a compelling, overriding interest can be shown. Congress and the President, in enacting these statutes, have said none exists, and Howard has not given this court any reason to contradict that judgment. (In Leary

The first part of the paper discusses the importance of the study and the objectives of the research. It also provides a brief overview of the methodology used in the study. The second part of the paper presents the results of the study and discusses the implications of the findings. The third part of the paper concludes the study and provides some final thoughts on the research.

The study was conducted using a qualitative research design. The data was collected through interviews with participants who were selected through purposive sampling. The data was then analyzed using thematic analysis. The results of the study show that there are several factors that influence the outcome of the study. These factors include the quality of the data, the quality of the analysis, and the quality of the conclusions.

The study has several limitations. First, the sample size was small, which may limit the generalizability of the findings. Second, the study was conducted using a qualitative research design, which may limit the ability to generalize the findings. Third, the study was conducted using a purposive sampling method, which may limit the representativeness of the sample.



v. United States, 392 U.S. 903 (1968), certiorari has been granted on this issue. )

V

THE MARCHETTI, HAYNES AND GROSSO  
DECISIONS DO NOT PROVIDE A BASIS FOR  
NULLIFYING 21 U.S.C. §174 AND 176a.

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Howard's mysterious, unexplained contention that the decisions in Marchetti v. United States, 390 U.S. 39 (1968), Grosso v. United States, 390 U.S. 62 (1968) and Haynes v. United States, 390 U.S. 85 (1968) are authority for the proposition that 21 U.S.C. §§174, 176a "directly or indirectly [violate] the privilege against self-incrimination", is incorrect. [Appellant's brief, p. 6, lines 6-12]. Neither the reported decisions nor an analysis of the statute sustains Howard's contention.

In Leary v. United States, 383 F.2d 851 (5th Cir. 1967); reh. en banc den., 392 F.2d 220 (5th Cir. 1968), the remoteness of the point was so great that the point was ignored by the defendant and the court. The defendant was attempting to go from Laredo, Texas to Mexico, when an inspection of his car and person disclosed marihuana. He was convicted of violations of 21 U.S.C. §176a and 26 U.S.C. 4744(a)(2). After his first appeal, the Marchetti, Grosso and Haynes decisions were reported. In his petition for rehearing, he raised the decisions, asserting that they compelled a rehearing and reversal of his conviction under 26 U.S.C. 4744(a)(2). The obvious inapplicability of the decisions



to his conviction under 21 U. S. C. §176a is demonstrated by the failure of the appellant to raise, or of the court to note, a claim that these decisions might operate to invalidate his conviction under 21 U. S. C. §176a.

Howard's contention was considered and rejected by two district courts. United States v. Reyes, 280 F. Supp. 267 (S. D. N. Y. 1968) is much like this case. The Court said, in part:

"In short, in Marchetti, Grosso and Haynes, defendants were each charged with a crime, an essential element of which was the failure to do an act, the doing of which would have required the defendant to incriminate himself; such is not this case." (at p. 270).

And it quoted this language from another case:

" . . . the United States has a right to prohibit entirely the importation of marihuana and has a right to attach conditions as to its importation. Pickett had the choice to obey the regulations or refrain from bringing the marihuana into the United States; (2) If Pickett had been required to invoice the marihuana, such action would not have subjected him to prosecution under 26 U. S. C. §4744 since that statute has reference to marihuana possessed or obtained, etc. within the United States. When Pickett came from Mexico, and until he passed the Port of Entry, or disregarded



his first opportunity to invoice the marihuana, he had not entered the United States." (at p. 272).

It concluded: ". . . despite the fact that the rationale of the Fifth Circuit decisions and of Pickett, supra, has been eroded, it seems clear that the Supreme Court's decisions in Marchetti, Grosso and Haynes do not invalidate an indictment for possession of unregistered and untaxed marihuana against one who was not required to incriminate himself." (at p. 272).

In United States v. Vial, 282 F.Supp. 472 (D. Mass. 1968), Chief Judge Wyzanski rejected this claim in a brief opinion. Cf. Arrizon v. United States, 224 F.Supp. 26 (S.D. Calif. 1963).

No court dealing with this question has sustained Howard's contention of unconstitutionality.

An analysis of the operation in this case of 21 U.S.C. §174 and 21 U.S.C. §176a shows the claim to be untenable. Howard has not been convicted of failing to register his possession of either the marihuana or the heroin. He has been convicted, in both counts, of "receiving, concealing and facilitating the transportation and concealment." Howard could not have complied with either statute by registering his intent to possess before, or his possession after, he acquired the contraband. The only point at which a declaration could have affected the character of the contraband was at the time and place of entry into the United States.

The tax statutes, which do contain registration requirements, are not part of this statutory scheme. This court has already recognized that there is no relationship between 21 U.S.C. §174



and some of the narcotics taxing statutes. In Verdugo v. United States of America, No. 20,803 (9th Cir. May 16, 1968) (slip opinion, pages 8 and 9), the court said: "None of the cases cited in Mathes Devitt's work in support of the instruction suggests this interrelationship between 21 U.S.C. §174 (1964) and the narcotic-taxing statutes 26 U.S.C. §§4701-4707 (1964). We have found none that do. 26 U.S.C. §4704(a) (1964) can be traced no farther back than the act of February 24, 1919 40 Stat. 1131, or perhaps, considered more generally, the Act of December 17, 1914, 38 Stat. 785. The origins of 21 U.S.C. §174 are found in the Act of February 9, 1909, 35 Stat. 614. When Congress made it an offense to "conceal" narcotic drugs in 1909 it could hardly have had in mind their failure to satisfy a tax obligation which did not exist until 1919, or 1914, at the earliest." An analysis of the comparative legislative history of 21 U.S.C. §176a and 26 U.S.C. §4741 et seq. shows a similar diverse origin.

There are both other federal statutes relating to marihuana, 26 U.S.C. §4741 et seq., and heroin 26 U.S.C. §4701 et seq. and other state statutes relating to them. See California Health and Safety Code, §§11530, 11501. Howard could have been convicted of some of them on this evidence. But, while he might have avoided some of those prosecutions by registration, he could not have avoided these, once he acquired the contraband. Convictions under other statutes are not before this court in this case.

Further, 21 U.S.C. §174 and 176a are not directed towards a highly selective group inherently suspect of criminal activities.





This court should not accept Howard's implied argument that "the narcotic drug business consists entirely, or even in the main, of shadowy figures in the underworld passing small glassine bags in dark alleyways . . . ."

"As of December 1966 there were 394,193 persons duly registered under the narcotics laws who were authorized to obtain written order forms from the government and engage legitimately in narcotic drugs transactions, and of these only one person was prosecuted during 1966 for a violation . . . [In 1966] over 170,000 kilograms of opium and over 260,000 kilograms of coco leaves were imported legally into the United States while only approximately 100 kilograms of narcotic drugs were seized or purchased in the illicit market by federal agents . . . . It would not be factual to say of the narcotic statutes and regulations what the Supreme Court said of other more general tax provisions - that they are 'directed at the public at large' . . . . It would be equally inaccurate, however, to say, that they are 'directed at a highly selective group inherently suspect of criminal activities.'" (United States v. Minor, No. 31953 (2d Cir. July 3, 1968) (slip opinion, at pp. 2960, 2961).

The report by the United States Treasury Department, Bureau of Narcotics, for the year ended December 31, 1966, cited



above and in the Minor case, supra, notes that 88 persons were registered under the marihuana tax act of 1937 to handle marihuana. (at p. 10). Of the 88 registrations under the marihuana tax act as of December 1966, 5 were importers, manufacturers and compounders, 9 were dealers, 59 were practitioners, and 15 were involved in research, instruction and analysis. (Table 3 at p. 44). These are persons who are legally authorized to possess marihuana in the United States. And those persons who may possess marihuana legally under federal law, may also do so under state law. The registration requirement in 26 U.S.C. §4753 is expressly conditioned upon the applicability of the occupational tax requirements of §4751. An analysis of §4751 shows on its face that the occupational tax provisions, are directed only towards those who may lawfully engage in marihuana transactions under state law. In enumerating the classes of professionals subject to occupational tax and registration requirements, §4751 follows the enumeration of classes of individuals who, under §3-7 of the Uniform Narcotic Drug Act, 9B ULA 409 et seq. - in force in all American jurisdictions - might lawfully manufacture wholesale, dispense, prescribe or possess marihuana. Thus, neither 21 U.S.C. §174 and §176a is directed toward a class inherently suspect of criminal activities.

The only disclosure of any kind in this case relates to the time of importation and the character of the marihuana and heroin. Neither 21 U.S.C. §174 nor §176a, in connection with this indictment, accuse Howard of any crime for failing to declare the



marihuana and heroin at importation. His crime is receiving, etc. a particular class of marihuana or heroin, that is, that which " . . . theretofore had been imported and brought into the United States contrary to law. "

Any merchandise being brought into the country must be declared at the time of importing, or as soon thereafter as is practicable, to the customs officer. 19 U.S.C. §1459, 1461, 1463. The heroin would not have been permitted through. 21 U.S.C. §173. The marihuana would not have been permitted through unless it was being imported by a registered importer, 21 U.S.C. §4751, 4753. However, at that point, neither would have the character necessary to a conviction under 21 U.S.C. §174, 176a. United States v. Reyes, supra; Arrizon v. United States, supra. If the heroin and marihuana were seized under 49 U.S.C. §781, 787(d), the matter would be ended. Only after the heroin and marihuana is imported contrary to law, does it fall within the class which permits conviction under 21 U.S.C. §174 and 176a. Howard, if he was the importer, cannot complain of his own failure to see that the customs law was satisfied at a time when he would not have been convicted, and, if he was not the importer, he was required to declare nothing.

The pith of Howard's contention seems to be that Marchetti, Grosso and Haynes permit him to participate in the importation of narcotics and marihuana, and the violation of customs law, without criminal penalty. That position should be rejected.



## VI

### THE BUICK WAS LAWFULLY SEIZED AND SEARCHED.

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The Buick was searched, and the heroin discovered, incident to a lawful seizure. Howard's argument that "there is no such thing as a search incident to a lawful seizure" and that this search, because warrantless, was beyond the Fourth Amendment, is incorrect and misconceives the issue. (Appellant's brief, p. 8, line 18, p. 11, line 12). No warrant was required to seize and search the Buick because the agents had probable cause to believe the Buick was used to facilitate the receipt, concealment and transportation of illegally imported marihuana.

The information available to the customs agents gives ample basis to support the seizure. Howard arrived in the Buick at a prearranged location to pick up a car containing marihuana. Before picking up the car, Howard, in the Buick made at least two passes, which the agents could believe were for the purpose of seeing whether the pickup could be safely made. The large sum of cash, and Howard's peculiar story, furnished additional reasons for believing Howard was not the innocent thief he claimed to be. The agents could also infer, that, if the marihuana were unloaded, the load car would be returned, and Howard would have used the Buick to depart from the area. After Howard's arrest, the load car was again properly searched incident to the arrest. Alexander v. United States, 362 F.2d 379, 382 (9th Cir. 1966),





cert. den. 385 U.S. 977. The marihuana which the agents had earlier seen in the load car was still there.

49 U.S.C. §781 provides in part:

"(a) It shall be unlawful . . . (3) to use any vessel, vehicle or aircraft to facilitate the transportation . . . concealment, receipt, possession . . . of any contraband article.

"(b) As used in this section, the term contraband article means -

"(1) any narcotic drug . . . which has been acquired or is possessed . . . in violation of any of the laws of the United States dealing therewith . . . or which does not bear appropriate tax paid internal revenue stamps as required by law or regulations." 49 U.S.C. §787(d) defines narcotic drug as including - marihuana . . .

The marihuana in the load car was in evidence and did not bear the appropriate tax paid internal revenue stamps. Further, the agents had personal knowledge that it was illegally imported into the United States and therefore acquired and possessed in violation of 21 U.S.C. §176a. Juvera v. United States, 378 F.2d 433 (9th Cir. 1967). 49 U.S.C. §782 authorizes the seizure of any vehicle which has been or is being used in violation of any provision of §781.

The Buick was used to facilitate the transportation, concealment, receipt and possession of contraband marihuana, and



the agents certainly had probable cause to so believe. Burge v. United States, 342 F. 2d 408, 410 (9th Cir. 1965); United States of America v. One 1957 Lincoln Premiere, 265 F. 2d 734 (7th Cir. 1959), cert. den. 361 U.S. 828 (use of car to drive to sale of contraband is to facilitate); Pon Wing Quong v. United States, 111 F. 2d 751, 756 (9th Cir. 1940) (pasting a sticker on a trunk in order to make passage through customs easier is facilitating the transportation of opium). Appellant's reliance upon Platt v. United States, 163 F. 2d 165 (10th Cir. 1947) is mistaken. In Platt the court held that the evidence did not justify finding that the auto was used to facilitate the purchase of the contraband there involved because it was not used in the actual purchase, but merely as a means of getting to the drugstore.

Once the Buick was lawfully seized, it was proper to search it. Lockett v. United States, 390 F. 2d 172 (9th Cir. 1968); Burge v. United States, 342 F. 2d 408, 410 (9th Cir. 1965).

The Fourth Amendment does not require a warrant. It forbids unreasonable searches and seizures. The seizure and search of the Buick Howard used to pick up the load car and the marihuana was clearly not unreasonable.



## VII

### THE EVIDENCE IS SUFFICIENT TO SUSTAIN THE CONVICTION OF HOWARD ON BOTH COUNTS.

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The evidence sustains, indeed compels, the conclusion that the trial court was correct in convicting Howard of both offenses. The presence of both the marihuana and the heroin in vehicles driven by Howard virtually eliminates any real possibility that Howard is the victim of accident, appearance and circumstance.

First, Howard's argument that as to him the marihuana is not illegally imported has now been rejected twice by this circuit and once by the Fifth Circuit. The proposition, that because customs agents, in the course of their law enforcement duties, uncover information that marihuana is to be illegally imported into the United States and then permit the illegal plan to continue under surveillance, the marihuana loses its illegally imported character, is neither good logic nor good policy. In Juvera v. United States, 378 F.2d 433, 437 (9th Cir. 1967), the court described Howard's contention as " . . . too frivolous to be worthy of comment." The Juvera holding was reaffirmed in Pedersen v. United States, No. 21,729 decided March 26, 1968 (9th Cir. ).

Any other rule would hamper customs law enforcement, and encourage the illegal movement of marihuana and heroin across our international borders. The risk of prosecution would be limited to mere drivers of the vehicle loaded with contraband who are usually only paid employees. The shippers in Mexico and the purchasers in the United States, those primarily culpable, would be protected



from prosecution by the very law enforcement techniques designed to catch them in the act.

As Howard concedes, the other circuits which have considered this issue, also hold that the marihuana remains illegally imported even though brought in with the knowledge of or under the supervision of federal customs agents. Haynes v. United States, 319 F.2d 620 (5th Cir. 1963); United States v. Davis, 272 F.2d 149 (7th Cir. 1959).

Second, the evidence in the case clearly sustains a finding that Howard had possession of the marihuana and the heroin. The marihuana was concealed in the load car; the heroin was concealed in the Buick. Howard drove both cars. The only question then is whether Howard knew the marihuana and heroin were there.

The load car was parked at a location designated by someone associated with the shipper in Tijuana after the marihuana arrived in Los Angeles. Within a short time after the load car was parked as directed, on a dark Los Angeles side street, Howard arrived. He scouted the area before leaving his car. He walked directly to the load car, got in and drove away. He stopped at a gas station to make a telephone call, and then resumed driving. When arrested, fourteen or fifteen blocks away from where he took the load car, he told a story about stealing the car in order to steal the wheels and sell them for \$8 each. He had a large sum of cash on him at the time. Both Howard's conduct and his story justify a conclusion he knew the marihuana was in the load car. This evidence is like that in Lannom v. United States, 381 F.2d 858





(9th Cir. 1967), where this Court said: "Lastly it is claimed that the evidence is insufficient to support the verdict. The same charge was made in Rodriguez-Gonzales v. United States, supra, (378 F.2d 256 [9th Cir. 1967]) and it was held that the assertion was patently without merit." (at p. 862) Aguilar v. United States, 363 F.2d 379 (9th Cir. 1966).

The evidence is equally sufficient to sustain a finding that Howard knew the heroin was in the Buick. Howard locked the Buick when he parked it and customs agents, using a key taken from Howard, had to unlock the Buick when they returned about fifteen minutes later. It is reasonable to infer that in the quarter of an hour that the Buick was parked, the opportunity for anyone else to place heroin in the Buick was limited to someone who also had a key and knew where the Buick was located. Of course, that such a possibility automatically negatives the more probable conclusion that the heroin was in the car while Howard was driving it, is unsupported in reason or authority.

Contrary to Howard's argument, ownership of the Buick is not an element which must be present to establish possession of the heroin. Of course, it would be relevant. Equally relevant is the actual custody and control of the Buick while the heroin was in the car. Ownership of the car driven by Howard is certainly a fact equally available to Howard, if the fact would provide any exculpatory evidence.

A final fact which the court could have used in determining that Howard knew the heroin was in the Buick was Howard's



arrival to pick up the marihuana. Howard's involvement with one kind of contraband is certainly evidence that a second kind of contraband associated with him, is present by design, rather than accident.

Eason v. United States, 281 F. 2d 818, 820, 821 (9th Cir. 1960) is a similar case. In Eason, the evidence showed that the defendants had gone to Tijuana and parked a convertible automobile with the top down on the streets of Tijuana for about three and one-half hours. On their return, a customs search revealed a paper bag containing marihuana and amphetamine and seconal tablets. In that case the defendants both took the stand in order to deny putting the bag there or knowing of its presence. This Court said:

"There is no question but that the package could have been put in its hiding place by someone without the appellants' knowledge. They contend under these circumstances that the mere fact that the goods were found in the car they were driving is not sufficient circumstantial evidence of knowledge; that an inference of innocence was as reasonable as an inference of guilt; that, since anyone could have put the package there, the jury was not entitled to infer from its presence in their car that appellants had put it there.

"Possession can be established by circumstantial evidence . . . (citing authorities).

" . . . We cannot say in this case that



the theory that the narcotics were secreted by a stranger is so patently reasonable as to warrant our ruling as a matter of law that an inference of knowledge was not available from the facts of the case. We conclude that it was proper to leave this determination to the jury and that its judgment will not be disturbed." (at pages 820, 821).

Finally, there is sufficient evidence from which the trier of fact could have found that the heroin was illegally imported into the United States. As this Court has observed, it is common knowledge that heroin may not be brought into the United States nor manufactured here. Verdugo v. United States, supra, at p. 6; 21 U.S.C. §173. And Howard possessed marihuana from Mexico, implying that he had the knowledge and ability to arrange for the illegal importation of heroin.

Howard's arguments may have been appropriate for argument on the evidence at the trial level. They are not sufficient to reverse this judgment.



## CONCLUSION

For the reasons indicated, the judgment should be sustained.

Respectfully submitted,

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